Edinburgh Tram Inquiry Office Use Only
Witness Name: Alastair Maclean
Dated:

THE EDINBURGH TR

Witness Statement of Alastair Maclean

Statement Taken by Willie Brian, 18 March 2016, in the presence of Chris Phillips, Clyde & Co.

My full name is Alastair Maclean. My contact details are known to the Inquiry.

Statement:

INTRODUCTION

1. I have provided a copy of my CV to the Inquiry (**CVS00000005**). My first role with City of Edinburgh Council (CEC) was Head of Legal and Administrative Services. This newly-created role essentially combined the heads of the legal and the administrative services of the Council. CEC had brought together the former Council Solicitor and Council Secretary roles. That latter post included the role of secretary to the Council and its committees.

2. In the combined function I had a team of about 200 employees. There was a budget of £12.5 million. I was the Chief Legal Officer for other entities including Lothian and Borders Police Board, Lothian and Borders Fire & Rescue Board, Lothian Valuation Joint Board and the Forth Estuary Transport Authority. I subsequently also became the Council's Monitoring Officer.

3. When I initially joined the Council as the new Head of Legal and Administrative Services in December 2009, my own involvement in relation to the tram project was (until August 2010) fairly ad hoc and piecemeal. Broadly my involvement consisted of responding to various ad hoc requests for advice and emails and

providing minor comments on some Council reports. For the first nine months of my time as Head of Legal until the departure of Gill Lindsay the former Council Solicitor I had no involvement in the Council's two top projects - Outsourcing (Alternative Business Models) and Trams. That was from December 2009 to August 2010.

4. Following Gill Lindsay's departure in August 2010 to September 2011, my role did include legal advisor on the tram project. I was the Council's internal legal advisor on the tram project during that period.

5. In September 2011 I applied for and was promoted to the role of Director of Corporate Governance. The new directorate of Corporate Governance was the result of an amalgamation of the roles of the then Director of Corporate Services (which Jim Inch held before retiring in 2011) and the Director of Finance (which Donald McGougan held. He also retired in 2011). The role gave me responsibility for both finance and corporate services including internal audit, risk, legal, HR, IT, communications, customer services, culture and overseeing the Lothian Pension Fund.

6. I had 1,800 staff under me and a revenue budget of £100 million per annum. With the other service area Directors and the Chief Executive I was effectively on the board of the Council namely the Corporate Management Team (as it was called in those days). I was indirectly responsible, with the rest of the Management Team, for the 18,000 staff in the organisation and £1 billion a year of revenue spend.

7. My duties as Chief Operating Officer and Deputy Chief Executive between January and December 2015 were broadly the same. I was there to deputise when the Chief Executive Sue Bruce was either unavailable or undertaking other matters. However, other than that, broadly, it was the same responsibility. .

8. Between December 2009 and August 2010 my duties and responsibilities in relation to the tram project were pretty much nil. My only involvement was ad

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hoc and piecemeal. That ad hoc involvement comprised a number of matters in connection with the project during that period.

9. My first involvement was a meeting between Richard Jeffrey, then Chief Executive of TIE, Andrew Fitchie of DLA, the external lawyers for TIE, and Brandon Nolan of McGrigors, also external lawyers for TIE, around about December 2009. They came in to try and explain to me roughly where they were. Whilst of interest it was frustrating not to be able to get involved at that time

10. I subsequently received a written update from Nick Smith around about January 2010 which provided me with an update as to where things were.

11. In February 2010, Marshall Poulton (the then Tram Monitoring Officer) who reported to Dave Anderson, Director of City Development (the Executive Director in Charge of Transport and Trams) sought advice on a Traffic Regulatory Order relating to the project.

12. Around March/April 2010, Tom Aitchison (the then Chief Executive) wanted advice on a letter from INFRACO or BBS. He asked me for my view on whether or not the Council should become more involved in negotiations at that time.

13. I remember that Dave Anderson started mentioning, around about May 2010, that I should, as Gill was leaving, join the Tram Internal Planning Group (IPG) which the Chief Executive had set up. I welcomed that involvement but in fact I did not join the IPG until Gill had left in August that year although I believe I started to be copied into the minutes in July of that year.

14. I think I was asked for minor comments on the Council report in June 2010.

15. Finally, in August 2010, when Gill Lindsay left, I became fully involved in Trams. From then onwards to September 2011, I was the Council's Chief Legal Officer advising on the tram project. I had all the responsibilities that came with that.

16. Post-mediation I was heavily involved in negotiating and getting the Minute of Variation 4 and 5 signed (MOV4 and MOV5). That was actually when I was still Head of Legal. MOV5 (the Settlement Agreement with the Infraco) was signed just before I became Director of Corporate Governance. Thereafter, as Director of Corporate Governance, my duties included finance and legal. This role included negotiating the Operating Agreement with Lothian Buses and various issues around trams.

17. From the arrival of Sue Bruce, the new Chief Executive at the Council in January 2011, I was a regular attender of her Tram Project Group. That group met twice a week to monitor the project after mediation and attended various committees. During that time the Executive Director responsible for trams was Dave Anderson and then latterly Mark Turley. Colin Smith, who was Senior Responsible Officer, also came in to report directly to the Chief Executive.

18. Gill Lindsay continued to be employed by the Council until 7 August 2010. Her job title, duties and responsibilities from 23 November 2009 onwards are set out in the letter to her from Jim Inch dated 12 November 2009 (**CEC00692177**). I was copied into that letter before I joined the Council and after I had accepted the job. In effect, she continued to be legal advisor to the Council on Alternative Business Models, the Council's major outsourcing programme, and on Trams until her departure. She reported directly to my line manager, Jim Inch. You can imagine that that was a rather awkward situation to find myself in. I'd just joined Edinburgh Council as Head of Legal and Administrative Services and my predecessor on the legal side was still in post and responsible for the Council's two most important projects. At that time, both of the projects were pretty much a watching brief for me as, at the same time, I was bringing together the new division of Legal and Administrative Services and also responsible for leading and managing the internal legal team and improving and reshaping it to realign with service area needs and to become more customer-focused . It certainly wasn't an ideal situation to be in but one I just had to adapt to in the best way possible for a finite period.

19. As time went on, it was becoming clear to me from what I could see and from people like Nick Smith that, even though Gill was employed by the Council with responsibility for those projects for a nine-month period of involvement, she was not that visible. My perception was that the Council and TIE were struggling to get on top of what was becoming a more entrenched dispute.

20. As for the handover, as far as I can recall there was not a formal handover from Gill Lindsay. That didn't worry me too much because the team under Gill, people like Nick Smith and so on, had already updated me informally over the previous nine-month period. There were informal briefings over that period where Nick felt the need to ask for advice and assistance.

21. When I joined the Council, I had little more information than a member of the public coming in from outside about the tram project and the dispute. Around about that time, Princes Street was being redone for the second time. The press stories were very intense about the state of play of the tram project.

22. The project was at that time being run by TIE with external legal advice from DLA, the project lawyers instructed by TIE. I think TIE also had some help at that time from McGrigors' construction litigation team in relation to the adjudications. CEC had oversight through the governance arrangements in place at that time.

THE INFRASTRUCTURE DISPUTE

2010

23. I note the email dated 10 December 2009 and found at (**CEC00473732**) where Nick Smith forwarded me an email he had sent Jim Inch, Dave Anderson and Donald McGougan. He expressed concern about the justification for entering into further supplemental agreements in relation to the INFRACO contract. I had no views at that point in time about further supplemental agreements. I'd been with the Council for around ten days. I just didn't have access to the necessary information to make an informed judgment. It's probably fair to say that at that

time I assumed that the senior people in the organisation were on top of what was presently a very tricky situation.

24. Before I joined the Council, adjudication decisions had been issued on 16 November 2009 by Mr Hunter in respect of the Gogarburn Bridge (**CEC00479432**) and Carrick Knowe Bridge (**CEC00479431**). Then on 4 January 2010, Mr Wilson issued his adjudication decision in relation to the Russell Road Retaining Wall Two (**CEC00034842**). I was not aware of and did not see or seek these adjudication decisions around the time of joining CEC. As I have explained, I wasn't substantively involved with the Tram Project until August 2010.

25. I note that on 14 January 2010, TIE received an opinion from Richard Keen QC on the interpretation of the INFRACO Contract (**CEC00356397**). I was not aware of and did not see or seek Richard Keen QC's opinion around that time.

26. I note my email dated 21 January 2010 (**CEC00473835**). I advise that I had no comments to make on a draft document *"other than to say that it still feels as though we are being too reactive. I would like us to get much more proactive around this if at all possible"*. I note that Alan Coyle noted that Donald McGougan and David Anderson had endorsed the intention to seek an independent legal view of the *"contractual outs"* within the contract i.e. the contract exit options. I note the documents from January and February 2010 and there are documents (**CEC00450359)**, (**CEC00479797**), (**CEC00480029**) and (**CEC00551307**) which suggest that CEC instructed Dundas and Wilson for certain advice. At this point, I'd been given informal briefings from people like Nick Smith and Alan Coyle. At this stage I had been with CEC for two months . I think a meeting had taken place, that I referred to earlier, between myself, Richard Jeffrey, Andrew Fitchie and Brandon Nolan. I remember that Richard Jeffrey and Andrew Fitchie singularly failed to answer basic questions I had around the termination provisions of the contract. That really did not impress me at all. In my opinion it displayed a degree of arrogance to the Council, as parent and financial guarantor, in a way that took me aback. As a result of that, and it's

probably still at this stage more gut feeling than informed judgments, it seemed clear to me that the Council needed to take its own advice. More particularly, the advice required was on the termination provisions only at that stage. It was fairly fundamental. TIE were thinking of terminating the Infraco contract and we needed to know where we were on the termination provisions.

27. I was concerned by what was referred to by senior officers of the Council as the 'one family approach' i.e. TIE and CEC had similar rights all the way through. That didn't feel right. I felt that we needed to find out our own view on what the termination provisions said.

28. At this stage, I still had no formal role in the tram project. However, Nick Smith had come to me. He was in the legal team and had asked me informally for advice on what to do. He was working with Gill Lindsay but had little confidence in Gill and he had little trust in TIE. Nick was involved in the Council's tram project team on the legal side. This was being run by Dave Anderson, the responsible director, with Donald McGougan on finance matters. I recommended that Nick instruct, through the Project Team, a good law firm who was not conflicted. There were not many left in Scotland who were not conflicted. We ultimately both agreed upon Dundas and Wilson. As far as I can recall, the advice sought was related to the interpretation of some key provisions of the contract.

29. I'm not sure I ever saw that advice. I think Nick did give me a quick summary of what the advice was. Really, it was a matter for the Project Team, and the important thing for CEC was to begin to have a degree of scepticism about the advice from tie and their lawyers against a backdrop of continued losses in the adjudications.

30. I note the report on "Project Pitchfork" (**CEC00142766**) which was prepared for the meeting of the Tram Project Board (TPB) on 10 March 2010. I note that the report contains certain criticisms of Billfinger Berger / Siemens (BBS), including criticisms in relation to the delay in progressing outstanding design since

financial close in May 2008 and criticism regarding the substantial increase in the scope of the design the SDS provider had been asked to deliver compared to the base scope. I didn't see the report at that time.

31. I did not see the "Report for TIE Ltd on Certain Contractual Issues Concerning Edinburgh Tram Project" produced on 23 March 2010 by McGrigors (**CEC00591754**).

32. I note the letter dated 8 March 2010 found at (**CEC00548728**) where Richard Walker of BBS wrote to CEC officials providing BBS's perspective of the dispute. I note that Richard Walker expressed concerns as to TIE's interpretation of the contract and handling of the dispute and advised that it was likely that additional costs were in excess of £100 million. I gave my views in emails dated 16 March 2010 and 12 April 2010 (**CEC00452358**) and (**CEC00235430**). I note that Tom Aitchison responded to BBS by letter dated 24 March 2010 (**CEC00356309**) to which BBS replied by letter dated 1 April 2010 (**CEC00234781**). I note that DLA sent a letter dated 19 April 2010 (**CEC00242190**) and Mr Aitchison sent a further letter dated 21 April 2010 (**CEC00236123**). I probably wasn't in a position to have a real substantive view at that time. At this time I hadn't had access to information nor had a formal role in the project. My own involvement here was to give a view from a tactical perspective on whether or not CEC should directly negotiate or discuss matters with the INFRACO consortium at that stage. There were three options as to the approach by the INFRACO consortium. The first view was that the parent company (CEC) should not become directly involved at that stage. This was a perfectly normal private sector approach. Shepherd and Wedderburn later agreed with that approach. The second view was that this was a negotiating or a tactical ruse and we should not allow the Council and TIE externally to be seen to be divided vis-à-vis the disputing contracting party. The third and final view, in tandem with not being seen to be divided with TIE, was that we could in the background get the Council to go and do its own homework, get stuck in and find out what on earth was going on.

33. I talked about all these matters with Tom Aitchison and maybe partially with my immediate boss, Jim Inch (Director of Corporate Services). I probably also discussed these matters with Nick Smith. I don't remember what the discussions entailed in any detail. At that time there was a very definite view, certainly from my superiors, that there should be a 'one family' approach between CEC and TIE. They held the view that TIE were the project managers responsible for running the project. At the time, the view was to keep matters going as they were. My own strong view was that CEC had to start getting the information and doing its own homework.

34. As it predated my arrival at the Council by a couple of years, I wasn't involved in any way with the drafting of the INFRACO contract or, in particular, the Schedule 4 Pricing Assumptions section. As it happens, I did later ask for Schedule 4 and experienced resistance in getting it from TIE. Did I see the INFRACO contract at any time? Certainly, yes. As I got more involved later, I became quite familiar with the INFRACO contract.

35. As for my views on the INFRACO contract, I'll maybe touch on just some immediate matters. My first view is that, just by looking at page 3 of the Schedule 4 Pricing Assumptions, you could see that this was not a fixed-price contract. You can see some very clear wording that the contract was priced on the basis of pricing assumptions and would lead to claims, almost immediately, after contract signing. You can see that the Pricing Assumptions were not clear.

36. I note that by email dated 22 May 2010 Nick Smith sent an email to me regarding Gill Lindsay's involvement with the Tram Project (**CEC00242406**). He also sent emails on 27 April (**CEC00242264**) and 30 April 2010 (**CEC00242287**). My view at the time of Nick Smith's correspondence was probably one of empathy and concern. I remember being unsurprised about the comments to do with Gill Lindsay. I think I was feeling pleased that I was hopefully about to be allowed to get involved in the tram project. This was because things were not going well. I felt I had a skillset that could assist. I was disappointed that I was

learning about this from one of my subordinates as opposed to from a senior management team member of the Council.

37. I note that further adjudication decisions were issued on 18 May 2010 by Mr Hunter re Tower Bridge (**CEC00373726**) and (**CEC00325885**). I note that on 24 May 2010 TG Coutts QC issued a decision re Section 7A-Track Drainage (**TIE00231893**). I note that on 4 June 2010 and 16 July 2010 R Howie QC issued decisions re Delays Resulting from Incomplete MUDFA Works (**CEC00375600**) and (**CEC00310163**). I did not see or seek these adjudication decisions around that time.

38. I note the email dated 11 June 2010 (**CEC00336394**) where Richard Jeffrey advised Andrew Fitchie that Nick Smith had had a discussion with me and that, amongst other things, CEC wanted a CEC legal person embedded in the Carlisle negotiating team when detailed legal negotiations took place. It noted that Nick Smith was of the view that if CEC Legal had been more heavily involved first time round *"We wouldn't be in the mess we are in now"*. Broadly, Nick was concerned that Gill Lindsay did not take enough active involvement last time around. He was concerned that she ignored concerns from him and from Colin McKenzie as to the contract He and Alan Coyle, who reported to Donald McGougan on tram finance matters were always concerned that TIE were not being open with CEC. He felt that we should have a person or persons embedded in the project to see what was going on. Whilst I didn't have a formal role in the project at that time, I supported the view and wanted to start to hear more about the project (especially if I was about to become more involved). The information flow between TIE and CEC and within CEC was not ideal. I was hearing a perception from others that we were not getting the unvarnished truth. I was keen for the Council to be on the inside in order to get the raw information.

39. I note the email dated 17 June 2010 (**CEC00242585**) where Nick Smith advised that he had had a long discussion with Councillor MacKenzie, *"During which I gave away very little"*. I'm not sure I can really comment on whether, at that time, members were being kept fully informed of developments in the tram

project. As the executive director, Dave was responsible for liaison with and reporting to the elected members. This includes the outcome of the adjudication decisions and the potential additional costs of completing the project. This is probably more one for Nick to comment on given they were his views. My views were that we were hearing inconsistent views on the success or otherwise of the adjudications. Again, whilst I wasn't part of the process, I did hear that. I certainly heard that when I became involved in Tom Aitchison, the Chief Executive's IPG around about August/September 2010. At that time, it was quite clear that all was not going well with the adjudications. Alarm bells were being raised. As to whether elected members were advised? People probably were trying to strike a fine balance reporting to members. Gordon MacKenzie was the transport convener at the time. They were perhaps being cautious because of potential leaks to the press. It's fair to say that that happened a lot after elected member briefings. I don't know how successful they were in treading that balance. Commercial confidentiality was also an issue at this time. I think people got confused by what they meant by commercial confidentiality. There was just the basic premise that you should be able to report to elected members and not find it in the press the next day to the possible detriment of the Council's position. I don't know the details of what Nick is exactly referring to here but that was a tension I saw throughout the tram project.

40. I note that on 24 June 2010 the Council were given an update on the tram project by means of a report from the Directors of City Development and Finance (**CEC02083184**). I did not have any input in the drafting of this report. It was sent to me and others by email on 15 June 2010 at 4.36 pm from Dave Anderson with a request for comments by close of play the next day. At that time there was no way I could have made any useful comment or observation. I am not aware of the process by which that report or other reports to members in relation to the tram project were drafted or which individuals from which organisations had an input into drafting the reports. Dave Anderson, obviously, as author of that report would be able to assist. I am not aware of what steps, if any, were taken to confirm the accuracy of that information. At that time I had no view on the statement in the report that, in relation to the adjudication

decisions, the advice received reinforced TIE's interpretation of the contractual position on the key matters under dispute. No advice was sought from me. It's likely the author of the report was referring to advice by TIE from their lawyers (DLA). I am aware that there was a tendency for information from TIE, representing their views, to simply flow through to the Council via the reports from Dave Anderson. My first involvement, as I said earlier, in relation to the adjudications was around August/September 2010 at the Tram IPG. It was patently obvious, and not a message that was being well received, that the adjudications were not in TIE's favour. This was contrary to what CEC had been led to believe by TIE about their prospects of success in the adjudications.

41. I note the email dated 2 July 2010 where Nick Smith set out the consequences of TIE serving a notice on BBS under Section 90.1.2 of the INFRACO Contract in respect of INFRACO's alleged default (**CEC00242631**). I further note (i) Richard Jeffrey's e-mails in August 2010 advising that the first (of several planned) Remediable Termination Notices under section 90.1.2 of the INFRACO contract and an Underperformance Warning Notice under section 56.7 (**CEC00242889**) had been issued; and (ii) Nick Smith's draft e-mail dated 12 August 2010 (**CEC00013658**) noting that CEC had not *"pre-approved"* the serving by TIE of these notices but would require its own independent legal advice on the strength of TIE's case to terminate. I had no views on the serving of remediable termination notices at that time. I wasn't involved in the detailed legal advice given in relation to the project at that time.

42. I note Gill Lindsay's email at (**CEC00242631**), one month before her leaving date, apparently seeking to absolve herself of her responsibilities over the previous eight months. She was the legal advisor to the project with assistance from Nick Smith. I had no informed views on any of these matters other than to say I was aware of concerns from people within the team, and others, about the performance of both TIE and Gill in that eight to nine month period. I certainly was aware of the alarm bells that were beginning to ring quite loudly. I was aware that TIE was the contracting party and that there was a legally binding operating agreement which meant CEC had delegated matters to TIE. But I

wanted to make sure that, before TIE sought to terminate matters, they came to CEC to seek the relevant consents that they were obliged to seek. tie were running the project, Gill was providing legal advice to those overseeing that. When eventually I was brought in, I was concerned that that the Remediable Termination Notices were vague. They were prematurely served by TIE. They were probably unenforceable. They were part of an erroneous strategy that did not appear well thought through or implemented by TIE.

43. I'm not aware of CEC being involved in the RTNs served by TIE or obtaining any independent legal advice on whether remediable termination notices should have been served at that stage. There was, when I became involved, very definitely legal advice sought in relation to these Remediable Termination Notices in the context of CEC potentially being asked by TIE to consent to contract termination. However, I'm not aware of CEC taking independent legal advice at that earlier time.

44. I note Nick Smith's description in his email of 2 July 2010 of the duty of care letter by DLA to CEC as *"virtually worthless"* (**CEC00242631**). I still haven't seen a version of the signed duty of care letter. In fact, I'm not sure if one exists. There is certainly a draft that exists. Nick Smith made the claim to me during that period that Gill Lindsay had failed to get that signed at the time of the original INFRACO Contract being let. In relation to the draft that I saw, I wouldn't say it is virtually worthless but I cannot comment any further for reasons of legal privilege.

45. My understanding is that there were significant issues with the CEC Legal Team prior to my commencement. The post of Council Secretary and Council Solicitor were amalgamated to create a new super-position of Head of Legal and Administrative Services. My understanding is that Gill Lindsay did not apply for that post and that Jim Inch agreed terms for Gill Lindsay to leave when she became 50 in August 2010 I refer to the letter that Jim Inch sent her (**CEC00692177**) which basically gave her the role to look after all legal matters in relation to the Alternative Business Model Programme and Trams reporting

directly to Jim Inch. Gill's departure did change my responsibilities for the tram project. That is the point in time where I became involved with and responsible for legal advice for the tram project.

1 August 2010 should be 8 January 2010

46. I note the email dated 1 August 2010 (**CEC00473789**) where Nick Smith sent me a document entitled "Tram-Potted History" (**CEC00473790**). Nick's email notes *"dissemination of the actual history here could cause serious problems and we definitely don't want to set hares running ... be very careful what info you impart to the politicians as the Directors and TIE have kept them on a restricted info flow"*. I found the information in that document to be very useful and helpful. I was relatively unsurprised. There were indicators that I'd picked up on during the previous nine months in relation to the project and the running of both CEC and TIE. I was concerned that Nick Smith felt that he had to tell me this under the radar. I wasn't aware whether the views in that document were held by other council officers. However, I did know that Alan Coyle and Nick Smith were very close and heavily involved at a day-to-day level with the tram project. I'm sure they would have discussed it.

47. I did have concerns as to whether members of the Council had been or were being kept fully informed in relation to the tram project. Alarm bells were beginning to ring around this time about member involvement. The klaxon only really went off when I sat in on some of the elected member briefings around about October 2010. Coming out of one of those briefings I felt it necessary to instruct independent legal advice. I ended up having to discuss my concerns directly and confidentially with Jenny Dawe, the Leader of the Council around that time (see document of my meeting with Jenny).

48. I note that on 7 August 2010, Lord Dervaird issued his adjudication decision in relation to the Murrayfield Underpass Structure and, in particular, whether under clause 80.13 of the INFRACO Contract, TIE were entitled to instruct BBS to carry out Notified Departures without a price having been agreed in advance (**BFB00053462**). I note that in a memorandum to Tom Aitchison dated 11 August 2010 (**CEC00013622**) David Anderson set out his view that following that

adjudication decision he was now *"deeply concerned"* about the project. That adjudication decision made sense to me. The first time I saw Dave Anderson's memo was following it being sent to me by the Inquiry. It shows a very narrow view of the options. For example, you could proceed under clause 80.15 if there's urgency or you can serve remediable breach notices. Those are only two views. There were other options available. People would only think there were two. It didn't look like TIE's approach was working or was correct and people were looking at things in quite a narrow way. I think I said earlier, it was at the August/September 2010 Tram IPG that it became obvious that what had been said by TIE about the adjudications simply was not credible. This was a further alarm bell and another big factor in wanting to take independent legal advice.

49. I note that on 20 August 2010, CEC senior officials (not including myself) met with TIE representatives to consider TIE's response to BBS and its Project Carlisle Counter-Offer Meeting. A record of the meeting (**CEC00032056**) noted a range of costs of between £539 million and £588 million for a line from the airport to St Andrew Square plus a range of between £75 million to £100 million from St Andrew Square to Newhaven, giving a total range of costs from the Airport to Newhaven of £614 million to £693 million. It is noted that this was essentially a re-pricing exercise for the completed design (which was thought to be approximately 90 per cent complete) with the intention of giving TIE certainty and that all of the Pricing Assumptions in Schedule 4 of the INFRACO Contract would no longer exist. It is further noted that BB were likely to be feeling very exposed as a result of the *"SDS/BB collusion agreement"*. I further note the reference to a secret agreement between BBS and SDS in Richard Jeffrey's email dated 10 December 2010 (**TIE00307699**). I don't know anything about such an agreement. SDS carried out the design work and historically they were novated into the INFRACO Contract. I'm hazarding a guess but maybe there was a side letter arrangement around that time as well as novation. I don't know what it was but it appears that Richard Jeffrey suspected something untoward.

50. At the time, I'm not sure that anyone at CEC or TIE fully understood that under Schedule 4 of the INFRACO any change from the Base Date Design Information (BDDI) other than normal design development could potentially constitute a notifying departure by TIE and that control of changes to design was in the hands of the consortium following novation of the SDS contract to BBS. This is odd given how fundamental an issue these particular provisions became.

51. I note the email dated 27 August 2010 (**CEC00013747**) where Nick Smith sets out CEC's analysis of the dispute and the information required by CEC to inform their decision making. I note that the email was sent to Richard Jeffrey and that he replied on 30 August 2010 (**CEC00208281**). Richard Jeffrey forwarded Nick Smith's email to Andrew Fitchie and notes *"I have explained to Dave Anderson that I consider this e-mail unhelpful and symptomatic of the CEC input lacking focus"* (**CEC00098063**). I note Richard Jeffrey's e-mail dated 26 August 2010 to David Anderson (**CEC00004301**) and Richard Jeffrey's subsequent e-mail dated 30 August 2010 to Andrew Fitchie (**CEC00208026**). Nick's email was calling for a complete and thorough review of strategy, full information to the Council and not going gung-ho for any one route e.g. termination. Although I was only three weeks into the project I did agree with Nick's comments which were written with my approval. Richard Jeffrey's comment was indicative of a wider problem in the working relationship between CEC and TIE. Tom Aitchison, the then Chief Executive, was very keen for what he called a 'one family' view between CEC and TIE. This essentially appeared to mean that there could be no difference in position between CEC and TIE. This stance wrongly assumed that TIE's and CEC's interests were necessarily aligned. There was also a feeling that there should be the appearance of little or no challenge by CEC. Around about then it was becoming abundantly clear that TIE were failing and that they were resenting and resisting CEC's involvement. It was also becoming clear that CEC's supervision was not adequate and that legitimate concerns were being and had been ignored. The more interest that I or others began to show, the greater the irritation and push back from TIE. TIE perceived CEC's interest as unhelpful or unwarranted. They maybe even thought of it as a lack of trust from

the Council. That was certainly developing around September to December 2010. At this stage it was becoming clear that TIE's approach was failing.

52. I note the letters dated 17 September 2010 where BBS stated that they considered that the Remediable Termination Notices served by TIE were invalid (**CEC00044541**), (**CEC00044540**), (**CEC00044543**), (**CEC00044544**) and (**CEC00044545**). I had serious concerns about the validity of these notices and, further, the strategy that TIE were adopting. Given the complexity of the contract and the factual matrix, I just could not form a view without specialist external help. However, it was sufficiently clear that there were significant concerns. We began to instruct Shepherd and Wedderburn around about the end of September / early October 2010. Until then, maybe with the one exception (the advice from Dundas and Wilson) my understanding is that the Council were relying broadly on TIE and their advisors to deal with the issue. Given my concerns about the approach of TIE, DLA, in some cases CEC's management team and the Project Team; we just felt it was absolutely necessary to seek external legal advice for CEC.

53. I note that on 22 September 2010, Mr Porter issued his adjudication decision in relation to Depot Access Bridge S32 (**BFB00053391**). This decision was one that was largely valuation based. There's a theme continuing to develop here. It was another loss by TIE. There was an increasing relevance of the BDDI against the IFC issue. There was an application of the rates in Schedule 4. The clause 80 change provisions were being interpreted in a way that appeared to make sense to me. That interpretation was contrary to TIE's interpretation. All these themes were coming out. They showed increasing issues with this contract (certainly around about the design and Schedule 4 and Clause 80). In summary, if I stand back from the adjudication decision, and assess my second month in the project - there's becoming a serious problem here. It was now overdue for CEC's team to step in and get to know quite a lot more. That was in direct contravention, at the time, to CEC's wider position of trusting in TIE and the 'one family' approach.

54. In the second half of 2010 TIE explored terminating the INFRACO contract. This would require CEC consent and the CEC team headed by Dave Anderson was brought into the discussions around termination. A special planning forum ("War Room") was established by TIE. I note that on 13 October 2010 I sent an email to Donald McGougan (**CEC00012760**) stating that the special planning forum was for CEC and not TIE and stated that *"TIE should come along to help us where we need them but not take control!" At this stage,* it felt like TIE were hurtling down a termination path and taking CEC with them. TIE, who had all the information were in control and CEC were potentially taking a critical decision that was not fully informed. This was against a backdrop of apparent passive reliance by CEC on TIE and their advisors and what was now shown to be a failed and erroneous strategy by TIE in relation to the adjudications. If the decision to proceed down that path had been taken, in my view, it would have been more for PR and political reasons than for well-informed legal and commercial reasons. TIE were under pressure to make traction and had consistently failed in the adjudications. I had quite serious concerns about the direction of travel. I realised that I was in a very small minority at that stage. TIE were quite forceful in getting their own way with CEC. My job was to try and protect CEC's position. In my view, I thought we should get some independent thinking to assess the information. If I look back on it all now, this was a bit of a turning point. I didn't realise at the time, but looking back, from that point onward the control of the project slowly started to move away from TIE to CEC.

55. In October 2010 CEC took independent legal advice from Shepherd and Wedderburn in relation to possible termination of the INFRACO Contract (**CEC00012498**). I note that by email dated 18 October 2010 (**CEC00135311**) Carol Campbell sent Richard Jeffrey a document (**CEC00135312**) setting out the factual information required by Shepherd and Wedderburn to enable them to advise CEC on the validity of the Remediable Termination Notices and the grounds for termination. I can't answer why people did not take independent legal advice before my involvement. I don't know why CEC did not have the factual information requested by Shepherd and Wedderburn, however, I do know that up to that point in time TIE were leading the show. They were the

contracting party. They were doing all the work. They were the so called transport experts that were set up to have responsibility for the project. They were set up, I think, at the request of Parliament. They held all the information. CEC, as parent company and guarantor, did not. I have to say I'm not convinced that's abnormal. However, it was certainly a hindrance when TIE appeared to resent or delay providing information to CEC when requested.

56. I would agree that in the absence of that factual information CEC officers, including myself, were not in a position to form a view on the validity of the Remediable Termination Notices and whether there were grounds for termination. Nicholas Dennys was the QC we went to. His view was that the Remediable Termination Notices were vague and imprecise. So, even without the actual full factual matrix that went along with the Notices there was cause for concern about their enforceability. That said, the need for factual information was still paramount.

57. I note that by letter dated 13 October 2010 (**TIE00301406**) BBS wrote directly to Councillors giving their views on the dispute. BBS advised that of the nine formal adjudication decisions issued BBS had six decisions in its favour. There were two split decisions with a principle found in favour of BBS and there was one decision in favour of TIE. BBS further stated that, in the interests of accuracy and transparency and, if TIE agreed, BBS had no objection to the disclosure of the adjudication decisions to elected members in order that they could make their own judgment. The adjudication awards and the INFRACO contract were not made available to elected members. I note my emails dated 13 October 2010 (**CEC00012786**), the email dated 18 October 2010 by Councillor Barrie (**CEC00012827**) and the draft response (**CEC00012828**). Matters within CEC were now beginning to move, however, I didn't have the complete legal advice as to where we were. I think that was due to come in a matter of weeks after the BBS letter. I actually had some sympathy with the arguments raised by BBS. It was sympathy on the one hand but a concern on the other hand. Whilst I understood the consortium was becoming frustrated, tactically it also suited them to push the pace and to play the dispute out in

public. Tactically, that did not suit us, at the council. I wanted CEC to get their ducks in a row before responding or playing out what was now a very serious contractual dispute in the court of public opinion. My advice to members pretty much was saying *"please hold off for a month or two until CEC knows where we are"*.

58. I don't know why the adjudication decisions on the INFRACO contract were not made available to elected members in the past. At that point in time they weren't allowed to see them. They were allowed to respond but we asked them not to respond for the reasons I've articulated. I can't say why they weren't made available before. I don't think members were able to come to their own view on the matters in BBS's letter of 13 October without sight of these documents nor were they essentially reliant on the advice from CEC officers on these matters. My view is that they were simply being asked to wait until we had full and proper advice to give to them. I can't talk about how full and proper the advice was before. All I know is now they were going to get full and proper advice. They were going to be given it but we hadn't yet got it. We needed to hold off members for a couple of weeks until we could tell them where we were.

59. I note the joint report to Council on 14 October 2010 (**CEC02083124**) where Donald McGougan and Dave Anderson provided a refreshed business case for the tram project focusing on a line from Edinburgh Airport to St Andrew Square with a high degree of certainty of cost and programme certainty. The contingency planning work undertaken by the Council and TIE had identified funding options which could address project costs of up to £600 million. The report states *"Due to the current uncertainty of contractual negotiations, it is not possible to provide an update at this time on the ultimate capital costs of the project"* (para 3.1) and that *"The overall outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"* (para 2.50). My comments on the report were principally related to ensuring we did not breach the confidentiality provisions of the contract. The draft I was given did not contain the wording to which you refer in paragraph 2.50. In fact, to the contrary it was clear in that draft that we are presently evaluating matters

and that we'd be bringing a comprehensive view in December. I am aware that the statement at para 2.50 was TIE's view. That wording was not in the draft that I was asked to comment on. I did not agree with the statement in the report that the overall outcome on the dispute resolution process remained finely balanced. I most certainly did not agree with that statement. That was TIE's view. No advice was sought from me or given by me on this matter.

60. I note the Highlight Report to the meeting of the IPG on 27 October 2010 (**CEC00012896**) which noted certain matters under Lessons Learned, paragraph 6. I also note the Lessons Learned section and paragraph 6 of the report to the IPG of 1 December 2010 (**CEC00013539**). My view was that the IPG wanted to spend time on a process-driven lessons learned review and it would be preferable to have a genuine thorough review as to where we were, what we needed to do and what strategy we would be deploying. TIE's strategy (to terminate the contract), thankfully, didn't proceed. The thorough review that I wanted didn't proceed as, later, the political drive for mediation took over from any proper reasoned analysis as to the best legal, financial and commercial tactics. The points that were made about completing the design and sorting out the contract, completing the utility works, having a proper agreement between TIE and CEC, having all consents in place, having competent legal advice at the time of contract negotiation and in relation to the bonus arrangements were all well made. The lack of each of those and other issues were all contributory problems to the contractual dispute.

61. It's fair to say the largest issue was undoubtedly the contract. The die was cast at the time of contract signing. It was almost inevitable given the shape of the contract i.e. the pricing assumptions and other non-favourable terms, that difficulties would arise.

62. I note the email dated 3 November 2010 (**CEC00012969**) where I requested that advice be sought from Shepherd and Wedderburn on a, *"novation issue"*. I note that *"TIE/DLA are insisting that it is all ok which is an unacceptable position bearing in mind the very clear conflict DLA has arising from the significant*

defects arising from their drafting of the minute of variation". I further note Alastair Richards's email dated 1 November 2010 (**TIE0069741**) with attached paper (**TIE00697416**). Probably, at this point in time, this particular issue was a red herring. Novation later became a very significant issue during the settlement agreement negotiations. At this point in time TIE were considering the effect of termination. They were still on the termination route. They wanted to know what would happen with CAF and the tram vehicles. Put bluntly, I think people got on quite well with CAF but were struggling at that point in time to get on with BBS. TIE wanted to know what would happen, if they terminated the contract, with CAF and the tram vehicles. CAF had been absorbed into the consortium and there appeared to be no cast iron right for TIE to have a direct contractual relationship with CAF or to take CAF out of the consortium under a novation. Carol Campbell and a junior lawyer at DLA, disagreed on this point. Yet again, TIE would not listen to CEC's concerns so we had to go to Shepherd and Wedderburn to get backup.

TIE0069741 should be TIE00697415

63. I note that the Action Note (**CEC00010631**) in relation to the IPG meeting on 9 November 2010 noted that I would seek an external legal view from Shepherd and Wedderburn on the merits of the Council engaging directly with BBS. I note my email dated 4 November 2010 (**CEC00012984**) which stated that CEC were to instruct their *"own independent analysis of TIE's position by CEC's QC"* and that McGrigors had been appointed to lead that work stream in place of DLA. I note the email dated 10 November 2010 from Shepherd and Wedderburn (**CEC00013085**) offering some practical guidance on the proposed meeting. I note that Tom Aitchison subsequently sent a letter dated 15 November 2010 to Richard Walker of BBS (**CEC00054284**). CEC had in fact, at this point, already sought legal advice from Shepherd and Wedderburn and Nicholas Dennys QC. I think that had happened around about 1 November. The request for legal advice from Shepherd and Wedderburn can be found at (**CEC00012942**) and **(CEC00012941)**. Alarm bells were going off in relation to TIE and its strategy.

64. Our own legal advice was being reported to CEC. At this point we had had the adjudications, the Remediable Termination Notices, the inability to get

information and the pushback from TIE. We had also had the briefing by TIE, and others, to the Labour Group where everybody in the room was assured by TIE that their QC had said that there was a cast iron right to terminate and win. I've never heard a QC ever say something like that. The wording of the contract was of concern and the fact that TIE was rushing headlong into termination. Putting all these matters together, in a fairly short period of time, it led me to recommend that independent external legal advice, separate from TIE's advice, would be a good idea. In the background TIE was saying they had legal advice saying that termination was cast iron. That actually proved later to be incorrect. All the background led me to wanting to engage with INFRACO in order to fact find. I was seeing various different versions of the facts flying around and I had suspicions as to where the real facts lay. I had little trust or confidence in TIE. That was certainly not the general CEC stance. There was also a concern that, if we didn't go into a meeting with INFRACO, we might be judicially reviewed should TIE wish to terminate further to CEC's consent. The lawyer we used was David Anderson a litigation partner at Shepherd and Wedderbun. He shouldn't be confused with Dave Anderson of the Council. Shepherd and Wedderburn's advice can be found at (**CEC00013085**).

65. I don't know why the Council did not engage earlier with BBS. I certainly know why I said not to engage earlier. I discuss that earlier on in my statement. As I mentioned there was an approach from senior management at CEC that the Council should 'stand together' with TIE, and TIE had adopted an intransigent and adversarial stance towards the consortium. I think the organisation, until I started highlighting my concerns, genuinely believed what TIE was saying about the contract, the dispute and the consortium. I think the tide started to turn with the continued losses in the adjudications where TIE's approach and interpretation of the contract was shown to be wrong time and time again on key points. I honestly don't know whether CEC should have engaged earlier. Part of me wanted to engage later, which sounds abhorrent, but that was arguably the best way. We had to get the information first before we could engage. At that point in time we had relatively little information. Certainly, with the benefit of hindsight, it was clear that TIE were making matters worse not better.

66. I note the email dated 5 November 2010 (**CEC00043529**) where Nick Smith provided an update on the previous day's consultation with Richard Keen QC. Richard Keen's current view was that if TIE failed to prove their case for termination then, unless BBS opted to terminate the contract for TIE default, TIE may be left with an extant contract. Effectively they would be 'locked in' to the contract. The position at this stage was that TIE had been telling us that they had a cast iron right to terminate and that this was backed up by a QC view. We, or at least internal legal, didn't have confidence in that. As I said earlier, I've never heard a QC say there was a cast iron right to win anything. Even regardless of that point, I was concerned given all of the things I was seeing. CEC had been relying on TIE and its strategy I didn't like the sole reliance upon people who, around about now, were beginning to fail or appear to fail to find any solution or a way forward. The advice from Richard Keen QC, if you like, was a first chink that showed a significant weakening in TIE's previous views. It sounds arrogant but it was something that CEC legal were already concerned about. We were, for the first time, starting to hear that maybe TIE's legal teams were worried about this as well. This was all contrary to what we had been told by TIE. I don't think the meeting with Richard Keen QC did change CEC's strategy at that time. We had already reached a view that we should treat TIE's approach with scepticism and instruct our own independent legal view. CEC legal were already, at that point, waiting for definitive legal advice from Nicholas Dennys QC. That came in one week later. We felt that rather than dancing to the new crisis from TIE we would hold still, get the legal position independently in a week's time and take it from there.

67. I note that by email dated 10 November 2010 (**CEC00013165**), Richard Jeffrey set out some thoughts in relation to the proposed meeting with BBS. He states *"What do we know of what really happened/was said around time of contract signature. We have already had an unpleasant surprise when investigating pricing assumption 3.4.1.1, what else is lurking out there? How significant is it?"*. I am asked whether the unpleasant surprise was in relation to Pricing Assumption 3.4.1.1 that's in the Schedule 4 INFRACO Contract (**USB00000032**).

At that stage, I had no visibility on these matters. The factual position seemed to be on shifting sands. This is why I wanted a fact find from INFRACO. Richard Jeffrey's email and timing is of interest. It appeared to be an attempt to steer the conversation with INFRACO as opposed to just allow INFRACO to tell us what they thought. CEC's legal team strategy was simply to hear INFRACO's side of the story. The unpleasant surprise, I think, was a reference to the fact that the pricing assumption that they were looking at was not as TIE had thought it was following the previous adjudication decisions.

68. I note the email dated 10 November 2010 (**CEC00013197**) where Richard Jeffrey suggests that any decision to terminate the INFRACO contract would be made by the TEL Board. I note that in an email on the same day, in the same thread, I advised that he did not like that suggestion. I saw this as a clear attempt to decide matters away from the elected members. It was probably, legally, a matter for the parent (CEC) to decide. This was a matter of basic governance and democracy. It was a matter for the elected members to decide. TIE and TEL were, in effect, the one entity. I did not believe that this matter would get the objective scrutiny that it needed were it decided by TIE and TEL. In summary, at that stage and subsequently, I did not believe a termination was right. I believed that TIE would have lost the inevitable challenge to that in court. I believed that it would have landed CEC and TIE into an even bigger problem. I was convinced that this would just be driven through by TIE and TEL without proper advice and scrutiny. After doing our homework in CEC on that strategy it was felt within the CEC legal team that we were between something bad happening and something catastrophic happening. We just had to get the right information, the right advice and make sure the decision was decided in the right forum.

69. I note the email dated 12 November 2010 (**CEC00013273**) where Nick Smith forwarded me an email Colin MacKenzie had sent Gill Lindsay on 15 August 2007 expressing certain concerns. I note another email dated 12 November 2010 (**CEC00013266**) where Nick Smith sent me the risk register that DLA had produced prior to INFRACO Contract close (**CEC00013267**). You

would need to ask Nick Smith why he sent me these emails at this time. Nick certainly would have been aware of my escalating concerns around the project. There was little love lost between Colin MacKenzie and Gill Lindsay. Notwithstanding that, Colin's concerns seemed sensible and they echoed various concerns that he had articulated to me sometime before about how the contract was signed off. An example of this was the request for CEC to become financial guarantor. This came very late in the day. Until then, there had been very little Council involvement. There was uncertainty around the duty of care letter from DLA. Gill, I understand, had been put in around about the time that TIE sought the guarantee from CEC. Gill had been put in by Tom Aitchison and Jim Inch to advise on this.

70. At that point in time, I did not have a view on the risk register. Since then, I have formed a very clear view on that risk register. My personal view is that it did not cover the risks that materialised. I personally consider that that was a material failing but it's not one I can expand on due to legal privilege.

71. On 16 November 2010, Richard Jeffrey advised me of certain serious concerns he had in relation to events at the time the INFRACO Contract was entered into. On 17 November 2010, I drafted a note for Jim Inch the Council's Monitoring Officer setting out those concerns (**CEC00013342**). I should say that I find the timing of that disclosure interesting. It came three days after a detailed note from me to Tom Aitchison and to Jim Inch on the current status of the legal work streams within CEC (**CEC00013289**). It came one day after a consultation with Richard Keen QC at which he advised of serious risks in relation to termination, echoing concerns that CEC had been saying for some months, things with which TIE had previously disagreed (**CEC00013308**). In saying that, I do not mean that Richard Keen QC's view had changed. I think the way it had been presented to us had changed. To try and decode that, the wheels appeared to be coming off TIE's strategy. It was against this background that this email came out (or at least the concerns from Richard Jeffrey). There's no need for me to summarise Richard Jeffrey's concerns as they are set out very clearly in my note (**CEC00013342**). He clearly had concerns around how the contract was entered

into and was now beginning to articulate them. Neither Richard nor anyone else, including any CEC officer, had previously expressed these concerns to me. The only exception to that is that I had heard some rumblings in gossip beforehand about bonus payments. After Richard Jeffrey reported his concerns, I reported the matter to the Monitoring Officer. That can be seen in my note at (**CEC00013342**). You will need to ask the then Monitoring Officer, Jim Inch, as to what was done by CEC, when and by whom to investigate the concerns and the ultimate outcome. All I know is that Richard Jeffrey instructed Anderson Strathern, a further set of external lawyers for TIE, and they reported back to him on 18 January 2011. I emailed Jim Inch and Donald McGougan to that effect on 18 January 2011. Ultimately Richard Jeffrey would not release a copy of Anderson Strathern's report to me but he did show me it. It was a four or five page document. My summary of that document effectively is found in my email of 18 January 2011.

72. I note my email dated 13 November 2010 (**CEC00013289**) which attaches a paper setting out certain concerns (**CEC00013290**) noting that *"TIE had continued to use DLA as its advisors in relation to the potential termination, but following adverse comment from CEC, TIE have engaged McGrigors"* (para 2.5) and *"as you are aware (and as we have seen from some of the adjudications to date) I have real concerns as to the quality of the factual information coming from TIE"* (para 7.3). I note the e-mail dated 15 November 2010 from me to Jim Inch (**CEC00013308**) which notes that a consultation had taken place with TIE's QC. In this email I state *"One thing I can say at this stage is that I am more sure (rather than less) that my concerns of last week are real"*. I note that in the e-mails dated 22 and 30 November 2010 I express certain concerns about TIE and the legal advice received by TIE (**CEC00013411**) and (**CEC00014282**). In my e-mail dated 26 September 2010 (**CEC00012450**) I observe that *"the advice received to date appears to be less than impressive"*. In my emails found at (**CEC00013411**) and (**CEC00014282**) I consider that CEC needed to think strategically about all options and which route was the best independently of TIE, rather than allowing TIE to take the lead on that. I note the e-mail dated 24 November 2010 from Richard Jeffrey to me (**CEC00013441**) where it states *"if*

the Council has lost confidence in TIE, then exercise your prerogative to remove TIE from the equation". I note the e-mail dated 30 November 2010 (**CEC00013550**) where Nick Smith lists his personal view on the performance of TIE and DLA. At this point TIE appeared to be out of their depth. The adjudications hadn't gone well. It took them a little while to work that out. They didn't appear to have a true or correct grasp of the contractual issues. The Remediable Termination Notices they'd been serving did not appear to be valid. Their strategy changed in one week four or five times. They were difficult to engage with and they were not providing information to the Council. They appeared in the latter days to be arrogant and rigid. DLA appeared conflicted. Interestingly, their involvement with TIE was only stepped down after pressure from CEC legal. Nick Smith said something to Richard Jeffrey at my request and then a day or two later DLA were stepped down by TIE. They were stepped down on 3 December 2010. This can be evidenced by the email chain ending 7 December 2010 (**WED00000004**).

73. As for when my concerns first arose, I can't say there was any definitive point or day that they arose. It was more of an evolutionary process. My concerns were certainly present when the CEC Legal Team chose to instruct Shepherd and Wedderburn and Nicholas Dennys QC on 1 November 2010. They were also present earlier than that when Richard Jeffrey assured the Labour Group that there was a cast iron right to terminate the contract. I think that was on 12 October 2010. I refer to paragraph 4.7 of my note dated 24 November 2010 **(WED00000008)** which sets out Nicholas Dennys QC's view that "*it is fair to say that the project management provided by TIE, to date, had not been conducive to the most orderly completion of the project and a more sceptical approach towards TIE is needed than has been shown to date. Serious consideration should be given to TIE's ongoing involvement in the project."* In summary, by late 2010 I had lost confidence. Senior management at CEC apparently had not.

74. I asked Nick Smith for his email dated 30 November 2010 which expressed concerns about TIE (**CEC00013550**). I had lost confidence in TIE's approach. At this stage, I was just Head of Legal and simply an adviser rather than the

decision-maker at CEC. However, personally, I had lost confidence. I was concerned that the errors of the past, which were highly relevant to now, were not being considered. I asked Nick to summarise what he perceived the issues of the past to be. As for my views on Nick Smith's email, sadly I was unsurprised.

75. The note of the consultation with Nicholas Dennys QC on 23 November 2010 produced by Shepherd and Wedderburn is at (**CEC00013529**). I note the email dated 26 November 2010 (**CEC00014282**) where I advised Richard Jeffrey of the advice CEC had received. Around that stage, I think CEC had no independent strategy and were simply going along with TIE on a 'one family' approach. CEC's legal strategy at that point in time was to obtain the necessary advice to inform CEC's wider strategy. It was going to take time to analyse the problem from a more informed viewpoint. CEC's legal strategy was set out at paragraph 1.6 of Nicholas Dennys QC's comments found at (**CEC00014282**). I don't think the strategy really changed. Maybe up to that point in time it was get the facts, but it was if we are going to terminate, for goodness sake, do so in a clear breach by INFRACO as opposed to a poorly articulated losing position that was presently the case. That was the catalyst for CEC starting to realise there's a problem and that they needed to change strategy going forwards. How did it actually change? CEC's former 'strategy' had been to leave everything to tie – it changed to one of scepticism and more proactive involvement. Around about then CEC instead sought to go straight into short form mediation. At the time I perceived they wanted that more for political and reputational reasons. I make reference to (**WED00000007**) and (**WED0000010**) which are my handwritten comments made on 24 November 2010 of where CEC was, what its legal position was and what the outcome was of the consultation with Nicholas Dennys QC following discussions with the Council Leader, Jenny Dawe, and then latterly within Tom Aitchison's Tram IPG.

76. I note that on or about 26 November 2010, Lord Dervaird issued his adjudication decision in relation to Landfill Tax and found against TIE (**BFB00053475**). That decision did not influence my thinking or strategy at the time. I don't know if it

affected the Council's thinking. It was yet another loss and continuing theme of TIE's lack of success in the adjudications.

77. In an e-mail dated 26 November 2010 to Richard Jeffrey (WED00000002) I noted, *"we are of the view that it is too early at present to formulate a strategy for any potential mediation, and the first step should be to proceed with our meeting with the Infraco to hear what they have to say"*. An exploratory meeting took place on 3 December 2010 between myself and Donald McGougan (on behalf of CEC), Richard Walker (Bilfinger Berger) and Antonio Campos (CAF). A record of the meeting can be found at (**CEC02084346**). My understanding following that meeting of the main causes of the dispute and the main problems with the INFRACO contract as perceived by BBS are set out in this document. I sent a summary of that document to Tom Aitchison, Donald McGougan and to Jim Inch on 4 December 2010 at 5.36 pm (**WED00000009**). That makes it clear that the consortium did not perceive it to be a fixed-price contract. There was a dispute that needed to be dealt with and not one that people could walk away from. I found the points made by Mr Walker entirely credible. Various things happened after the meeting. There was that email from me to Tom Aitchison to which I referred earlier. There was also an email from me to Jenny Dawe , the Leader of the Council on 10 December (**WED00000003**). That email summarises where we were. There was also Richard Jeffrey's email of 7 December to Tom Aitchison, Donald McGougan and myself wanting Anderson Strathern to conduct an audit on events at contract formation (**WED00000004**). There then was a meeting between the Council Leader Jenny Dawe and the two doctors of the consortium, Dr Keysberg of BB and Dr Schependahl of Siemens. I don't know what happened at that meeting. Other than that, nothing else, as far as I'm aware, happened. It's probably fair to say the reason for that was that on 18 November CEC decided to go into short form mediation. The motion for that can be found at (**CEC00005541**). If you like, matters were overridden by political will around that time.

78. I note the letter dated 6 December 2010 (**TIE00668156**) where I advised Richard Jeffrey that, following a meeting that day with Tom Aitchison and Donald

McGougan, CEC's preferred strategy for commercial reasons was to move to mediation on a short-term basis ideally with a view to both sides walking away from the INFRACO contract. I further noted that that could perhaps, at least initially, take place under the guise of a rebased route and a new contract with the consortium. Short form mediation was decided as the strategy of CEC following the Liberal Democrats' Emergency Motion on 18 November 2010 that I've just referred to. As for it being a mediation where people looked to walk away, that was considered by the meeting I've just referred to. Tom Aitchison, Donald McGougan and Richard Jeffrey were the decision makers. I was present at the meeting on 6 December 2010. It was considered to be the most likely outcome, given the very broken relationship with INFRACO and given the costs of believed termination from the meeting with Richard Walker.

79. The legal strategy advised by Nicholas Dennys QC was that ultimately terminating was the most likely and probable route we should go down if things couldn't be sorted. However, that route should only be undertaken when CEC and TIE knew where they were and had positioned themselves that INFRACO were in breach. A possible breach could have been failure to progress the design. Where was the design that still hadn't been completed? Nobody had pushed the Infraco for the design by that stage. Instead Remediable Termination Notices were being served by TIE for other things. If termination was going to happen, it should happen when you've got strong grounds for terminating.

80. The short form mediation was CEC going in without having all its ducks in a row hoping to do some sort of a deal. My clear view from a legal and financial perspective was that you only go into something when you're ready for it. I advised that mediation for a contractual dispute such as this would take a lot longer than two or three days but I can understand why that was undertaken. It was because there were huge political and reputational issues. The decision was not all just legal and financial. I think one of the questions here is whether I agreed with the strategy that came out of the meeting on 6 December 2010? Legally and tactically, no I did not. Politically and pragmatically I could

understand why that decision was taken. Whilst it was a matter for others, I could see the tension between legal, financial and tactical against political and pragmatism.

81. Elected members agreed to the short form mediation. It was obviously a matter for them to decide. They decided that in the Council Chamber. I don't know what else was discussed between the Leader of the Council, Jenny Dawe, and Tom Aitchison, the then Chief Executive at their weekly Monday morning Leaders' meetings. I certainly know this issue was due to have been discussed at one of those meetings. Legally and tactically I had concerns with the strategy. Politically and pragmatically I could understand how the decision came about. My role was to advise, but taking the ultimate decision was for the elected members of the Council.

82. On 13 December 2010, Richard Jeffrey and Jenny Dawe met with representatives of BBS and a note of the meeting was produced (**CEC02084349**). I have no idea what the purpose and outcome of that meeting was. I was aware of the existence of the meeting. I assumed it was just an initial exploratory meeting before mediation. I think it was generally just a meeting between the senior representatives of BBS and CEC to discuss how the mediation could be taken forward. I've never seen the notes of that meeting before. The first time I saw this note was after the Inquiry sent it to me.

83. On 16 December 2010, Tom Aitchison provided the Council with an update on the refreshed business case (**CEC01891570**). The report notes that a line from the Airport to St Andrew Square was capable of being delivered within the current funding commitment of £545 million. At the meeting an amendment was passed by members to request a review of the business case by a specialist public transport consultancy that had no previous involvement with the Edinburgh tram project. The minutes for the meeting can be found at (**CEC02083128**). My only input was the wording for Clause 3 of the report about the emergency motion.

84. I note from the Action Note of IPG meeting of 1 December 2010 (**TIE00896611**) that Tom Aitchison wished to make this report to the Council *"as 'high level' as possible, focussing on strategy rather than detail."* I hoped it was more to do with not showing our hand publicly to the tactical advantage of the INFRACO consortium at mediation. I feared it was more to do with keeping things calm with the elected members through keeping things at a high level.

85. I cannot speak to the level of confidence within CEC that a line from the Airport to St Andrew Square could be delivered within the funding commitment of £545 million. I note there's an example in the report to the meeting of the IPG on 17 November 2010 (**CEC00010632**) which indicated that a line to St Andrew Square could be delivered for £545 million to £600 million. I note the report to the meeting of the IPG on 1 December 2010 (**CEC00013539**) which indicated that it was expected that the cost of the project to St Andrew Square was likely to be in the region of £600 million if the job was re-procured. I did not have access to the numbers until I became Director of Corporate Governance in October 2011 so it's difficult for me to be specific. . I think that there was a hope that matters could be contained within the budget or even, at worst, contained within £600 million. There was a hope but I never saw anything that evidenced that.

86. I am not aware of why members requested an independent review by a specialist consultancy with no previous involvement for the project. I assumed it was because they had no confidence in the business cases up to that point in time.

87. I note the Highlight Report for the meeting of the IPG on 21 January 2011 (**CEC01715625**). It notes that both Nicholas Dennys QC, instructed by CEC, and Richard Keen QC, instructed by TIE, had advised that the best option was to seek to enforce the contract until grounds of termination could be established as a result of a failure to perform the works. It was unclear to what extent there had been a rigorous approach by TIE to enforcement of the contract pending the Carlisle negotiations and their focus on termination. The report noted that: *"TIE Ltd presently appear to be in a weak position legally and tactically, as a result of*

the successive losses in adjudications and service of remediable termination notices [RTN's] which do not set out valid and specific grounds for termination" (p7). The consortium was noted to be extremely well prepared. It was further noted, *"However, there was a desire commercially and politically to move towards mediation notwithstanding TIE Ltd's (apparently) relatively weak tactical and legal position. That is likely to have a financial implication with the INFRACO as the party in the stronger position faring rather better out of it than might otherwise have been the case. Against that there are financial and other costs involved in allowing matters to continue".* These extracts of the Highlight Report were my views, drafted by me and spoken by me at the Tram IPG. My views were known by Tom Aitchison, Donald McGougan, Jim Inch and the Leader of the Council, Jenny Dawe. CEC nevertheless chose to proceed with short form mediation. I do not know to what extent my views and those of internal and external legal of the Council were disseminated to the wider elected member group.

88. I note the report to the IPG on 21 January 2011 (**CEC01715625**) and the Action Note on that meeting (**CEC01715621**). In preparation for the mediation various meetings took place in Apex House at Haymarket, which was TIE's Head Office. Those meetings were between Sue Bruce (the new Chief Executive), Colin Smith (whom she brought in to assist her from a technical perspective and who sometime later became Senior Responsible Officer for Trams), Richard Jeffrey, Donald McGougan, Dave Anderson (the director responsible for Trams), myself, some TIE external advisers, Tony Rush, Nigel Robson, Brandon Nolan (a Partner then at McGrigors now Pinsent Masons) and others. Various meetings took place between all these people. Before Sue Bruce's arrival, I think TIE, Tony Rush, Nigel Robson and Richard Jeffrey had been working on preparing for mediation. This was more on a sort of commercial basis than anything else. They had tried twice to resolve matters with the consortium under project names that escape me. One of them was Project Carlisle. They'd been having their own meetings, if you like, at the end of 2010. Then there were the wider meetings, with CEC and TIE taking part, that were held to try to prepare for mediation. Ultimately, they came together in the form of a mediation statement.

The statement can be found at **(BFB00053300)**. . After that mediation statement we went into Mar Hall for mediation on 8 to 12 March 2011.

89. I didn't play a huge part in the preparations for the mediation. I attended the meetings that included CEC that I've just mentioned. The objective seemed to be more about collating information for a horse-trade rather than a full mediation on the merits. Had it been a full mediation on the merits then, as legal advisor, I would have been involved. This was more a short form negotiation that would stray slightly into the legal merits. Brandon Nolan drafted the mediation statement for TIE with CEC's approval.

90. The objectives of mediation were to settle the dispute. It was to try and get to a negotiated position by either re-scoping the contract (i.e. shortening the line) or to walk away and terminate for as little cost as possible. The preference then appeared to be to rebase the contract and shorten the line.

91. Mediation talks took place at Mar Hall between 8 and 12 March 2011. TIE prepared a mediation statement (**BFB00053300**) as did BBS (**CEC01927734**). A statement "ETN Mediation - Without Prejudice - Mar Hall Agreed Key Points of Principle" was signed by the parties on 10 March 2011. The principles of that were then incorporated into a Heads of Terms document **(CEC02084685)**. There were very many people present at mediation, somewhere in excess of 50 people. I wouldn't be able to name all the personnel. Those that I can remember are set out in the table below. They were the key players.

ORGANISATION	ATTENDEES THAT I RECALL WERE PRESENT (this is not an exhaustive list but represents the individuals I actively recall)
Bilfinger Berger	Dr Jochen Keysberg, Richard Walker, Martin Foerder and Kevin Russell. BB's lawyers (Pinsent Masons) were Fraser McMillan and Suzanne Moir.
Siemens	Dr Schependahl and Alfred Brandenberger. Siemens's lawyer (Biggart Baillie) was Martin Gallagher
CAF	Antonio Campos. CAF's lawyer (Burness) was Gavin Paton
City of Edinburgh Council	Sue Bruce, Colin Smith, myself, Alan Coyle, Dave Anderson and Donald McGougan
TIE	Nigel Robson, Tony Rush, Richard Jeffrey, Alastair Richards, Steven Bell, Vic Emery. TIE's lawyer (McGrigors) was Brandon Nolan.
Transport Scotland	Ainslie McLaughlin.

92. I did very little at the Mar Hall negotiations. I attended some of the CEC and TIE meetings. I wasn't invited to any of the meetings with BBS. I attended only one or two hours of meetings with CAF. I was more heavily involved in the second half of mediation at McGrigor's Glasgow offices. This was where Mar Hall's key points of principle were fleshed out (insofar as you can call it fleshed out) in the Heads of Terms.

93. It's hard for me to comment on the exact details of the mediation at Mar Hall because I was not a core participant. I think probably I was there more for the sake of appearances. I know the mediation started off with a plenary opening debate at which everyone was there. I know there were break-out groups of people debating e.g. finance people got together to debate finance matters. I think Sue Bruce, Vic Emery and the two doctors from BB and Siemens were the

main players. I watched those debates. I know that late one evening offers and counter-offers did go between the main parties. That was between Vic Emery, Sue Bruce and I think the two doctors. I understand this was done on scraps of paper. They went backwards and forwards to reach agreement. Exactly what the content of those pieces of paper were and how many of them went backwards and forwards, I don't know. Vic Emery, Sue Bruce and BBS can advise on that. I don't know whether CEC or BBS's position changed over the course of the mediation. On the basis that these pieces of paper were offers and counter-offers that went backwards and forwards then there must have been a change. I can't tell you to what extent. I wasn't privy to that information.

94. The Heads of Terms agreement was agreed in the second half of mediation in McGrigor's Glasgow offices on 12 March 2011. I was privy to that particular part of the mediation. I was more heavily involved at that stage. I recall that the mediation went on longer than expected. I think we spent two or three days at Mar Hall and then we decamped into McGrigor's Glasgow offices. At that point in time I became much more heavily involved in helping to arrive at the Heads of Terms. I think the views of everyone on the outcome of the Heads of Terms, first of all, was relief that terms had been agreed for a way forward. However, there was also a concern as to where the money would come from. I just couldn't say if it was a good or a bad deal financially. This was because I didn't know what the numbers were and where people were. Legally, I had concerns about still working with the original agreement. That had a whole host of problems in it. We were going to have to try and tweak that agreement to make it acceptable going forwards. There was nothing we could do about that (short of rewriting an entire contract with huge procurement concerns and spending months and months and months renegotiating the contract). There was little else we could do.

95. Other persons within CEC held concerns about the issue of self-certification. CEC / TIE's certification of the works was passed over to the consortium to self-certify. There was a large area of trust there. Some people were concerned about that. TIE certainly thought (or they appeared to think) that BBS had 'won'.

96. Everyone knew they all had to go away and get the necessary approvals, board approvals or full Council approvals or whatever. If you like that was step one. Step two was the Minute of Variation (which later become known as MOV 4). There had been three minutes of variation to the Infraco contract before. This was the fourth Minute of Variation. It had to be entered into by 1 May 2011 because certain priority works needed to start by that date. After that people were expecting MOV 5 to be entered into by 1 July 2011. MOV5 was the main agreement to vary the Infraco contract to reflect the agreed settlement terms. MOV 5 was to include a 'divorce sum' (i.e. a separation sum) if CEC couldn't come up with funding. People were expecting after that for funding to be obtained by 1 September 2011. Failing that everyone would walk away and separate. These were the clear milestone dates.

97. I note the email dated 12 April 2011 (**TIE00686636**) where Steven Bell notes in respect of legal advice in relation to the draft Minute of Variation of the INFRACO Contract arising from Mar Hall, that McGrigors should consider writing an advice note to CEC highlighting the significant amendments to the INFRACO Contract, and to TIE's rights and remedies to ensure that that was clearly recorded in writing. He further notes *"We would not want to repeat the type of issues raised/concerns expressed which have been raised with DLA and visibility of the original advice over the INFRACO Contract"*. I had four views on Steven Bell's email. Some of his points were fair points, some had already been covered off, some were back covering and just not agreeing with the wider negotiation deal and some were ironic given his and TIE's apparent failures on the project up to that point in time. I agreed that we would not want to be in a position where we did not understand the contract or the risks being taken at the point of signing. This is why I say there's some irony here. CEC fully understood the risks at the point of signing each of MOV 4 and MOV 5. They were given detailed confidential appendices at the time. Sue Bruce and Vic Emery were fully informed on the quite significant legal, commercial and procurement risks which arose.

98. On 16 May 2011, CEC were given an update by the Director of City Development (**CEC01914650**). The figures in the Heads of Terms i.e. the price of £362.5 million for the Off Street Works and a target price of £39 million for the On Street Works (i.e. Haymarket to St Andrew Square) were available at the time of the Council meeting on 16 May 2011. I don't know when the figures were first presented to the members. The members certainly would have been aware of those numbers when authority was sought from them to make the amounts binding. In other words, when members authorised people to sign MOV 5, they certainly would have been aware of them by then. Precisely when they were made aware before then I do not know.

99. Parties entered into a Minute of Variation dated 20 May 2011 and 10 June 2011 (**BFB00096810**) (MOV4). This varied the INFRACO contract to allow certain priority works to take place. There were three parts to that agreement. The first part was for hostilities to cease. The second part was for certain work to restart in certain areas. The third part was to test the performance and ability of all parties to work together after mediation. Only the mediation negotiators will know the reasons behind why each of those parts were agreed. The ostensible reason, which I can understand, was to get the work going because there were parts of Edinburgh in total disarray that needed to be sorted e.g. Gogar Roundabout and Haymarket. People were keen for work to get going as soon as possible on key sites and then certainly test performance.

100. I note that in June 2011 McGrigors produced a draft report *"Report on Certain Issues Concerning Edinburgh Tram Project - Options to York Place"* (**USB000000384**). Brandon Nolan was the Partner at McGrigors. They were the law firm who had been involved in advising TIE on the contractual disputes and extension of time claims. Brandon was at the mediation. His firm assisted on MOV4. Given that there was still a chance of separation if MOV5 either wasn't entered into or if it was entered into and funding wasn't obtained, he was asked to pull a paper together summarising the costs of all the various options from a legal perspective. That was the purpose of that report. The report was never finalised. There was no advice as to the best option for CEC contained in the

report. There was no preferred option. By and large Brandon Nolan didn't feel able, as a lawyer, that he alone correctly could arrive at a conclusion. I don't know if a lawyer could. Multiple professions needed to be involved in forming advice such as that. The report was more a factual analysis of the dispute and the alternatives. I think Faithful and Gould came in somewhere to comment or contribute to that, but they weren't able to finalise their conclusions. You would need to ask the decision makers to what extent they felt informed by the report. It was made available to senior officers. Dave Anderson was the Executive Director in charge of Trams at that stage. It certainly informed the confidential appendix that was given to the elected members prior to the June 2011 Council meeting at which the decision was taken. You'll see the report referred to at paragraph 3.33 (**CEC02044271**).

101. I note the email dated 29 June 2011(**BFB00094944**) by Marc Hanson of Ashurst. He noted that CEC did not understand how the Target On Street Works Price had increased from £39 million to £52 million (and noted that the Off Street Works Contract Price had also increased). Ashurst were real serious tram experts around the globe. They were brought in to help us do the more complicated MOV5. McGrigors (who later became Pinsent Masons) were retained to help us on various matters but we needed Ashurst's help on MOV5. That was the involvement of Marc Hanson of Ashurst. As for the change in price, it was to do with how the Target On Street Works Price was calculated. Originally it was calculated based upon an out of date version of the design. Then a new version of design had been formed throughout the process, so, if you like, the calculations were out of date. Colin Smith would be able to confirm that but I think that was the reason. When it came to tying up the Design and the Employer's Requirements, this issue was picked up and it had to be rectified by price adjustment. Colin Smith, Martin Foerder of BB and myself had a meeting at Waverley Court. The issue was agreed but a number needed to be put to that. Colin Smith and Martin Foerder ultimately were the ones who arrived at the number.

102. On 30 June 2011 CEC were advised of the options for the tram project in a report by the Director of City Development (**CEC02044271**). It was recommended that CEC complete the line from the Airport to St Andrew Square/York Place at an estimated cost of between £725 million and £773 million, depending on the risk allowance. I can't completely recall how the increase in cost of the tram project for a shorter line was received by members but I remember it being a difficult meeting with senior officers, including myself, taking a very active part in presenting the options to the members. That was very unusual for Council meetings. Normally, senior officers are not asked to speak in Council meetings. In this particular case the whole top table was taken up with senior officers presenting the options to members.

103. I note the Informal Note (**TIE00688605**) produced of the meeting of the Council. The author of the note is unclear. I note that it was sent by email dated 1 July 2011 (**TIE00688604**) by Mandy Haeburn-Little to Susan Clark and Steven Bell. I've not seen this note before it was sent to me by the Inquiry. I have no views on the note. At that time, the Council was in an invidious position. For the first time in a long time the members were presented with a complete set of options (however unpalatable they may have been). It was time to move on and sort out the problem. The project was badly affecting the City, the Council and the people of Edinburgh. It had to be done one way or another.

104. I note the email dated 7 July 2011 (**TIE00658366**) from Terence Van Poortvliet of Ashurst. He noted certain issues in relation to proposed changes in the Employer's Requirements. I note my email dated 15 July 2011 (**BFB00097296**) to Alfred Brandenberger expressing certain frustrations about a lack of momentum in negotiations against the background that at Mar Hall it had been envisaged that the formal settlement agreement would be entered into on or before 30 June 2011. I note the email dated 27 July 2011 (**BFB00094966**) by Mr Van Poortvliet attaching a key issues list of the major outstanding items. It's probably worth saying that all the main issues and differences were documented very clearly throughout the project during my time. Documents which are relevant are the Heads of Terms at **(CEC02084685)**, MOV4, MOV5, and the May

2011 Council Report (**CEC01914650**) (there's a confidential appendix to that report which I've not seen in the papers - it's hugely important the Inquiry sees that confidential appendix). Other documents that are important are the June Council report (**CEC02044271**) (there's a confidential appendix to that report which I've not seen which I think the Inquiry should definitely be looking at) and the note to Ainslie McLaughlin that's referred to later in the questions (**CEC02082652**). Finally the notes that are referred to in that note to Ainslie McLaughlin should also be seen. A collation of all these documents plus the one from Terence van Poortvliet should display the main issues or differences that arose during the discussions that gave effect to the Mar Hall agreement and show how those issues were resolved.

105. We didn't want the two confidential appendices to the May and June Council reports to enter the public domain because we were still negotiating with the consortium. However, it was vitally important that the elected members knew what the terms of the new deal were and what the risks were that were associated with those new terms. Members understood they were confidential and couldn't go into press because they would have prejudiced our negotiating position. They had to be fully informed in taking their decisions. For the Inquiry, they are the two real places that summarise what was going on.

106. There were written briefing notes and notes for instruction from my superiors throughout. However, it was sometimes very hard to get clear, or indeed occasionally any, instructions from people after Mar Hall. In summary, the Mar Hall Heads of Terms was extremely high level so, in effect, the substantive negotiations only really took place after the mediation.

107. The main issues from memory were as follows, there are quite a few, but I'll just go through them. These are in no order of importance. They are just the order I remember them in.

108. The first is that we were retaining but amending the original defective agreement contract and the effect of that.

109. The second is that there was a clear difference in what people thought they had agreed at mediation by what Target Sum meant for the On Street Work. The CEC negotiators appeared to think that this by and large meant a fixed sum. BBS thought it meant a target sum.

110. The third was that the Pricing Assumptions in Part 4 of the Schedule for the On Street Works, in particular, utility risk, design change and landfill tax all had to be discussed and retained but tweaked.

111. The fourth was the Pricing Assumptions for the Off Street Works. The deal was that Off Street would be genuinely fixed price. It turned out during negotiations that some pricing assumptions were kept in place for the Off Street Works. Because of this, we had to work through what's the risk associated with keeping some pricing assumptions for the so called fixed price Off Street Works. Members were informed of all these issues in the confidential appendices.

112. The fifth, is that the On Street Price increased, as we saw earlier, as it was calculated based upon a design at a certain stage.

113. The sixth was there was an increase in the price due to the delay around the August/September 2011 Council decision.

114. The seventh was the interaction between MOV4 and MOV5 if one is entered into but the other doesn't happen i.e. when does termination kick in, how does that play out and what does it mean. That had to be discussed and agreed. That became academic because MOV5 was entered into, funding was achieved and the Tram was built.

115. The eighth was the novation of CAF. One of the few things that people got right in the original contract was that CAF were inside their original contract. That meant issues of integration between the people digging the road (BBS), the electrical systems providers (Siemens) and the tram vehicle providers (CAF)

were all the consortium's problem. They were not TIE's problem or the Council's problem. People agreed at mediation that CAF would be novated out of that original deal. The very, very big question that took a lot of time to resolve was what that meant for integration risk? Does that pass integration risk to the Council or TIE? That was unacceptable and was not going to happen. That integration risk around disaggregation of the consortium was a problem.

116. The ninth was that the Employer's Requirements had to change. There was a lot of detailed work around that. You can change the contract but if the list of the services you're getting, the Employer's Requirements, isn't changed as well you're wasting your time. This is why the detail in the Employer's Requirements had to be worked through. The detail included how we split the Bilfinger Berger Siemens work and the CAF work. This took us back to integration again.

117. The tenth was the programme had to change because it was a shorter route which had different timescales.

118. The eleventh was the Separation Sum. This had to be agreed in the event of termination.

119. The twelfth was that Clause 80 had to be rewritten. The problem with Clause 80 as it was in the contract was that if there was a dispute around a change and the price that had to be paid, work stopped. Work did not continue. That is why Edinburgh was a mess for months or years. That was why no one could force the consortium to get on with the Works if a dispute arose unless it was urgent. A lot of problems arose around that. That clause had to be discussed. Ultimately it was rewritten.

120. The thirteenth, was procurement risk. Was this contract being materially changed? If it was being materially changed you arguably had to re-tender under procurement rules. Whose risk was that? At mediation, I think it was agreed in the Heads of Terms that it was a 50/50 risk. CEC would bear 50 per cent of the risk of that, INFRACO would bear the other 50 per cent. That

changed when the Council had to bear 100 per cent of the risk later on, for reasons I can come back on.

121. The fourteenth is, what I call, the On Street Ripcord. That had to be inserted. If we find the On Street Works are continuing to cause repeated problems then CEC now had a right to pull the ripcord and ditch the On Street Works and only do the Off Street Works. That required abort costs to be paid to the Consortium. There was a whole negotiation as to what those abort costs were. None of this was talked about in the Heads of Terms and it all had to be fleshed out.

122. The fifteenth was that intellectual property consents and licenses needed to be received from Siemens and CAF or warranties that they had the licences in place.

123. The sixteenth was utility sequencing. Previously, INFRACO in the contract had a very nice provision whereby TIE or its contractors would go in and sort out a site for utility purposes and INFRACO would go nowhere near that site until it was ready. If this tram project was to be running in a manner that was acceptable to everyone, then that sequencing of utility works and whether or not people would work together on sites was hugely important. That required big negotiation and changes.

124. The seventeenth was Edinburgh Gateway. How did Edinburgh Gateway fit in? This is the rail link out at Gogar Roundabout running out to the Tram Depot. How did that fit in with the re-sequencing of Works and the programme and the Employer's Requirements? Put bluntly, the Scottish Government, at that point in time, didn't know what they wanted with the Gateway, so we had to negotiate some provisions around how that could then be inserted at a later point in time.

125. It was never going to be possible to negotiate, draft and agree all that work from 12 March to 1 July 2011. That was never going to happen. MOV4 took longer due to trust and culture and relationship issues than was predicted. MOV5 took longer because of the misunderstanding about what Target Sum meant and

because of the poorly thought out idea of allowing CAF to be novated without thinking about the integration consequences. It also took longer because of the issues between BBS and CAF. These were not insignificant. Finally it was because of the work required on the Employer's Requirements and the Pricing Assumptions. The negotiations also took longer because of the August / September Council delay. The deal took longer sometimes because of errors by the consortium. Shandwick Place, I think, had to be dug up twice more than it should have been because there were errors in the work that had been carried out there by the consortium. This was to do with the cracking under the rails.

126. I note that by email dated 11 August 2011 (**CEC01720733**) I advised of a serious technical issue that had arisen in relation to the interface of the Siemens and CAF systems. I'm struggling to remember the full detail here but there was an integration problem between the tram vehicles and the overhead electrical wires. From memory, I think (and I'm going to put this into layman's language for no other reason than that's the way I understand it) there was a large thick cable or pipe that carried the electrics from within the tram vehicle. That cable went underneath the tram vehicle. It U-turned back up to get to the overhead electrical wires. That large thick cable or pipe, at the U-turn, seemed to scrape off the road as the tram vehicle went along. That, rather amazingly didn't appear to be an easy thing to solve. I don't know how that was resolved. Colin Smith went away into a series of detailed operational meetings with the key protagonists. They came up with a technical solution. It took two or three weeks to get there.

127. 30 June 2011 was simply an impossibly tight deadline to stick to if we were going to resolve all the issues properly. There was nothing particularly per se that was bad. People weren't dragging their feet. It was just that realistically doing that amount of work in that timescale was never going to happen.

128. I note that on 25 August 2011, the Council were given a further update by way of a report by the Director of City Development (**TRS00011725**). The report noted that Faithful and Gould had worked with Council officers in validating the base

budget for the proposed works. There was a requirement for funding of up to £776m for a line from St Andrew Square/York Place (comprising a base budget allowance of £742m plus a provision for risk and contingency of £34m). Additional funding of £231 was required, which would require to be met from Prudential borrowing, at an estimated annual revenue charge of £15.3m over 30 years (which, applying a discount rate, resulted in a present day value of the additional borrowing of £291m). At the Council meeting, members did not accept officers' recommendations and instead voted in favour of an amendment that a line should be built from the Airport to Haymarket. I don't think I personally had any input into the drafting of that report. CEC legal certainly wrote the legal risks section contained in the Confidential Schedule to which I referred to earlier and the wording in paragraph 3.7.

129. My view on the members' decision that the line should stop at Haymarket was that it made no financial sense. In addition, the implications for the Council's grant funding from TS of that decision was an unknown at the time. It is important to say that, strictly, anything less than the full project to Newhaven could have triggered a withdrawal of TS's Grant Funding. The feeling was that a rebasing to York Place would have been acceptable to TS because they were involved in mediation that agreed that option. But anything other than the full line was an unknown.

130. At a special meeting of the Council on 2 September 2011, members were provided with a report by Sue Bruce (**CEC01891495**). After the vote, the Council agreed to build a tram line from the Airport to St Andrew Square/York Place. The meeting was called specifically to reconsider the Council decision on 25 August 2011 as a result of a material change in circumstances. Unlike what was reported in the press, there were two reasons for that. There wasn't just one. One reason was INFRACO were unlikely to agree to go to Haymarket alone. The second one is the one that is reported in the press, which is that TS indicated that they would withdraw the funding should the Council continue to only go to Haymarket. The members had effectively no choice. They had to change their mind.

131. On 2 September 2011, parties entered into a Second Memorandum of Understanding (**TIE00899947**) to extend the timescale for entering into settlement agreement (MOV5) until 14 September 2011. The Memorandum recorded that *"INFRACO has an entitlement to additional costs and time as a result of the Full Council Meeting decision"* (i.e. the decision on 25 August 2011 to stop the tram line at Haymarket) (paras J and 3.1-3.3). On or about 12 September 2011 I sent a letter to Ainslie McLaughlin of TS (**CEC02082652**) which noted that the Council having "twice" reversed its previous decision had caused an increase in cost and uncertainty for the consortium. The purpose of the Second Memorandum of Understanding was to extend the date to finalise MOV5 and secure and confirm funding. Now that we knew we were going to York Place and not Haymarket we had to record in MOV5 an entitlement for the consortium to have additional costs, as a result of the delay in the Council approving the York Place deal.

132. Whilst there was a two-week delay between those decisions, that incurred a work programming delay of around six weeks. That meant prolongation costs were due to the consortium. That was largely due to subcontractor costs. My understanding was that additional costs were about £3 million to £4 million.

133. The two occasions where the Council had reversed its previous decision were firstly, on not getting a clean decision in June 2011 when the elected members wanted more information on the risks before agreeing to go ahead which caused the decision to come back again in August. Whilst that didn't cause any delay per se, in the minds of the consortium there was uncertainty as to how committed CEC was to the deal. The second was the obvious one - the Haymarket decision as opposed to York Place, which was then reversed two weeks later in September.

134. On 15 September 2011, a full and final settlement agreement (**BFB00005464**) was entered into between TIE, CEC and the consortium. I've referred already to the various places that people can look at to see for themselves the main

changes made to the INFRACO Contract by the Settlement Agreement. The two confidential appendices are the main documents to look at. In summary, the existing contract remained in place and amendments then were made to the existing contract in four ways.

135. The first way was MOV4 **(BFB00096810)**. MOV4 was to do several things. It was to pay for and take ownership of Siemens Materials to complete the line to Newhaven. This was to do with going to York Place but also paying for and taking ownership of Siemens Materials to Newhaven. That was one bit of MOV4. A second bit of MOV4 was to carry out priority works by certain planned completion dates i.e. Prince Street Rectification Works, the Haymarket Viaduct, the Depot Access Bridge, the Depot, the Mini Test Track and the A8 Underpass. The third bit of MOV4 was to set out the interaction with the *"to be negotiated MOV 5"*, so if we didn't enter into MOV5 or if it didn't become unconditional, in either case because of funding, then the contract would automatically terminate on terms that still had to be agreed. Otherwise we were pretty much back to where we were. The fourth bit of MOV4 was to cease hostilities. That was one change. The next change was Extension 1, which I've already discussed. It was the supplemental agreement to change the dates. The third change was the second extension supplemental agreement, which we've already talked about. Then the fourth thing was MOV5.

136. MOV5 was the 15 September agreement. It did 13 things. The first was it settled the dispute. The second is it de-scoped the contract length from Newhaven to York Place. The third is that it provided *"a fixed price Off Street Works section"*. The price for that was £362.5 million. That was still subject to some pricing assumptions (although broadly INFRACO took on the utility risk of that section). The fourth thing was there was to be a variable target sum for the On Street Works where most, if not all of the pricing assumptions, remained in place. TIE retained the utility risk around that. The fifth was to provide CEC with a ripcord to terminate the On Street section on payment of abort costs if things weren't going well. The sixth was to require INFRACO to continue with works pending resolution of any dispute as to costs. In other words, if there is a falling out as to

costs, works would carry on. The seventh was to change the Employer's Requirements. The eighth was to change the programme. The ninth was to deal with the procurement risk I've already referred to. The tenth was to include a price for delay caused by the Council Decision of August (which was reversed in September). The eleventh was to let INFRACO self-certify the design. Certification by CEC of design was taking a long time so self-certification was allowed. The twelfth was to novate CAF out of the consortium, deal with integration issues and to make sure the Consortium were left with those issues. The thirteenth was to change the contracting party to remove TIE and substitute CEC instead.

137. Following the Settlement Agreement, the line from the Airport to York Place was completed within the revised programme and budget with very few, if any, formal disputes arising.

138. I will give my views on broadly how the previous problems with the tram project had arisen. I place them in no order of importance .

139. The obvious problem was that the design wasn't complete before the contract was let. People didn't really know what they were buying.

140. Everyone knows the utility works were not cleared properly.

141. The bespoke contract was extremely poor. It was riddled with significant drafting problems. The best way of describing it is that this was a contract that was the equivalent of buying a car with three wheels. That was done presumably to enable a certain headline price to be achieved at the time the contract was let. Because of this, the pricing assumptions, I'm assuming, were then introduced. This was not, and never was, a fixed price contract. Contract claims were always going to arise because the contract actually expressly says that. Even Dr Jochen Keysberg of BB said within the papers that the Inquiry has shown me that this contract will never get a tram built. The legal advice that TIE received

on the INFRACO contract is questionable. For reasons of legal privilege I cannot expand on that.

142. Supervision by CEC, pretty much up to my involvement, appeared light touch at best. The contractor was difficult even after mediation. The consortium was an uneasy one. There were tensions between Bilfinger Berger / Siemens on the one side and CAF on the other. Sometimes there were even tensions between Bilfinger Berger and Siemens.

143. TIE's strategy, their project management and their execution appeared inadequate. They appeared out of their depth.

144. Whilst TS didn't add much when they came back in to supervise post-mediation, the fact that they were pulled out of a project at the start was a tactical error. There was poor project management. There was poor governance. The consents process was slow and cumbersome. There was a groundswell of opinion against the project from the outset. Whilst I understand that happens in most tram projects the first time round and it gets better with extensions, it's not helpful to be starting a project where there's a fairly large groundswell of opinion against it in the first place.

145. Almost regardless of whatever was agreed in mediation, it just had to get better. Everybody was losing out badly. Everyone's reputation was badly affected. The project had national, sometimes global, media looking at it. I think everyone felt the pressure that it had to be sorted. Having said that, I'm sure the consortium felt that the budget now became more realistic. Effectively CEC and TIE had settled the time delays. They had, for the first time, bought the fourth wheel that was missing on that car. Relationship management was substantially better than it was before. There was a real hostility between TIE and the consortium in 2010. Every effort was made to improve that relationship from 2011 onwards. There was better project management. Turner and Townsend came in. They were hugely professional. CEC took over the project from TIE and put it into intensive care. This meant the project had better governance. There was value

engineering going through this process. The project was slightly depoliticised. There wasn't micro-management at every level politically. There was a substantially more professional team.

GOVERNANCE

GENERAL

146. A lot of the governance arrangements changed after the Settlement Agreement. It is a bit difficult for me to talk about in the former governance arrangements that predate my involvement. Having said that, my personal views in relation to the structure are that it was overly complicated. It is probably fair to say that, notwithstanding the relatively clean bill of health Audit Scotland gave the project back in February 2011, there was no clear accountability or clear scrutiny. You can see Audit Scotland's description of the structure at page 34 of their report (**ADS00000046**). This shows a convoluted corporate structure that was not conducive to clear decision making. It was for that reason that the governance of the project later changed.

147. The failure of the tram project and other projects in CEC, around about that point in time, was the reason why I introduced a major projects office when I became Director of Corporate Governance in October 2011 (discussed further below). The tram project was excluded from that office. It was treated as a hermetically-sealed project. It was effectively in intensive care for a number of years post-mediation.

148. I note the letter dated 7 January 2010 (**CEC00550621**) where I advised Malcolm Reed, Chief Executive of TS, that pursuant to an Act of Council dated 20 December 2009, the Council had transferred ownership of TIE Limited to TEL Limited, and that in terms of the operating agreements in place all significant decisions relating to the tram project would now be taken by TEL through its formal committee the TPB. Day-to-day contract management delivery remained with TIE. I would struggle to provide a definitive answer as to which body or

organisation took all significant decisions in relation to the tram project prior to CEC transferring ownership of TIE to TEL. The letter has my electronic signature on it. From the date I can see that I've been in the Council for around three to four weeks by then (if you exclude the Christmas holidays). I am guessing there was a formal requirement for the Council to advise TS about changes in structure and that this was being issued formally and signed by the Head of Legal as 'proper officer' on behalf of the Council. Nick Smith was the legal officer with day-to-day involvement on the project. He would be better able than me to explain the TIE and TEL governance arrangements at that time. I wouldn't be able to describe the role, duties and responsibilities of the TIE board after that transfer.

149. I note the email dated 14 October 2010 (**CEC00012798**) where Alan Coyle attached a note (**CEC00012799**) drafted by him and others, highlighting some key issues going forward. These issues included, under TIE, *"Council team must be involved and show leadership"*; under Governance, *"More rigorous governance must be established"*, *"CEC should have an empowered clear leader established to make decisions on the project"*, *"FCL committee should be properly formalised"*; and, under Legal Advice, *"Engagement of new lawyers must be established.* This predates my involvement for reasons I have explained earlier. In relation to the points specifically referred to in Alan Coyle's document, I agreed with his views.

150. I note the report by Dave Anderson to Council dated 25 August 2011 (**TRS00011725**) noted that *"The existing governance arrangements for the tram project are complex and have not been effective"*, the governance arrangements had had to take account of the complexity of the arm's length bodies that were proposed to deliver an integrated transport service once trams had become operational and that there was a need to revise the overall arrangements *"to ensure effectiveness, accountability, probity and integrity going forward"*. I strongly agreed with these comments. One of the positive outcomes post-mediation was a reworking and simplification of the project management and governance. I found that the operating agreements that did exist were poorly

drafted, were misnamed and were not sufficiently precise to counter the overly convoluted structure which existed.

151. Substantial changes were introduced in the governance arrangements, project management arrangements and reporting arrangements on governance after Mar Hall. They're referred to in Appendix 3 of the report to Council dated 25 August 2011 (**TRS00011725**). It became a much more streamlined arrangement which didn't go through third party entities like TIE and TEL. The project was within CEC's remit with a streamlined reporting mechanism within that.

152. Following Mar Hall the project management arrangements became much clearer. There were twice weekly meetings every Tuesday and Thursday morning from 8.00 am till 9.30 am - 10.00 am. There were professional project managers brought in in the form of Turner and Townsend. There was a marked difference between Turner and Townsend, as project managers, and TIE. Colin Smith became the Senior Responsible Officer over all of this. He did an extremely good job. There was relationship building with the contractor. The skill set increased in the Council team in the shape and form of Sue Bruce, Vic Emery, Colin Smith and myself. This was now a dedicated project within CEC. The project became something that wasn't being done in addition to people's day jobs, so to speak.

153. The reporting arrangements to the elected members became much clearer. The Governance, Risk and Best Value Committee was set up within the Council as part of my review of political governance arrangements in 2012. There was clear reporting, clear scrutiny and very clear numbers being given to the elected members on the budget. There was regular reporting in a consistent way. We worked hard to get that into a consistent reporting format.

154. All this was done firstly because INFRACO wanted and had asked for it. That's mentioned in the Heads of Terms. They struggled with the governance arrangements that CEC had. They struggled with TIE's project management arrangements. Secondly, it was done because the existing structure simply

didn't work. Thirdly, it was done because CEC wanted to take control of the project going forwards. The project was ultimately done in CEC's name and CEC needed to exercise control to make things work.

155. Turner and Townsend were the new project managers for the project when the project was hived up from TIE to CEC. I note the letter dated 12 June 2012 (**CEC02028556**) where Berwin Leighton Paisner advised CEC on possible breaches by Turner and Townsend of a services agreement dated 20 October 2011. Marc Hanson was a partner at Ashurst who moved to work as a partner in Berwin Leighton Paisner. That was the connection there to Berwin Leighton Paisner. I had no material concerns with Turner and Townsend. They were doing an excellent job from what I could see. They were doing an excellent job in difficult circumstances with BBS who were still difficult to work with. My understanding was there had been some predominantly minor breaches by Turner and Townsend. CEC appeared not to have suffered any loss arising out of those breaches. The matter was resolved following discussions between Turner and Townsend, myself and Colin Smith together. We ensured improvements in relation to the issues that are referred to in that letter.

156. Colin Smith oversaw the project and Turner and Townsend on behalf of CEC. He reported directly to Sue Bruce. Colin formally became, after mediation, the Senior Responsible Officer. Sue Bruce was the Project Sponsor and Colin was also the independent certifier under MOV5.

THE CITY OF EDINBURGH COUNCIL

COUNCIL OFFICERS

157. A lot of people from CEC were involved in this project over the various years. There are too many people for me to describe them all but I'll try and capture the main people. The following is in no order of importance.

158. Andrew Holmes was the director of City Development, the area of the Council was that was in charge of transport at the time. He was before my time. He oversaw, effectively, the contract that was put in place by TIE at the time of contract formation. He was the Executive Director with responsibility for transport and trams at the time of contract signing. He was replaced literally the same week as the contract was signed. He retired and was replaced by Dave Anderson.

159. Marshall Poulton worked directly to Dave Anderson as Head of Transport. He was the Tram Monitoring Officer under the previous governance arrangements

160. Tom Aitchison was the Chief Executive of the Council until he retired in December 2010. He chaired the Tram IPG that we've referred to already.

161. Jim Inch was my line manager and the Director of Corporate Services. I don't think he had any formal role in relation to trams, but I may be wrong on that.

162. Donald McGougan was the Finance Director of CEC. He was a member of the TPB. He had a key governance role with Dave Anderson and Marshall Poulton under the previous governance arrangements.

163. Gill Lindsay was Council Solicitor and Legal Advisor to the Tram Project until 7 August 2010. She was replaced by me from that date onwards. I was Head of Legal and Administrative Services.

164. Sue Bruce became Chief Executive in January 2011.

165. Mark Turley was Director of Services for Communities. He later became Executive Director in charge of trams towards the end of Dave Anderson's stint at the Council when responsibility for transport moved from City Development to SfC.

166. Colin McKenzie was a senior solicitor in the litigation team at the Council.

167. Nick Smith was probably at the time a middle ranking lawyer in the Legal team. He was the lawyer with primary day-to-day involvement.

168. Alan Coyle was a mid-ranking finance officer who was also heavily involved in the Project, reporting to Donald McGougan.

169. I note Mark Turley's views in relation to the remit of the IPG set out in his email dated 15 June 2010 (**CEC00268322**). I am not certain what the remit of the Chief Executive's Tram IPG was. It was established before my time, although I sat in it a few times at the end of 2010. The first time I saw Mark Turley's email was after it was provided to me by the Inquiry. I entirely agree with the comments.

170. I do not know precisely what the role, remit and responsibilities of the Tram Monitoring Officer were. My understanding is that it was a key governance role involving monitoring of TIE's project management on behalf of CEC and reporting directly to the Director of City Development, Dave Anderson, as the Executive Director responsible for the Tram Project. I did not see much involvement of the Tram Monitoring Officer in the project.

171. I did have concerns about the performance of certain CEC officers in relation to the tram project. I had concerns about the strategy that was being deployed. I had concerns about TIE's project management, TIE's reluctance to provide information to CEC and TIE's reluctance to engage in a positive way with CEC. It did feel generally that people were at sea. At the time I became involved I perceived there to be an inertia, almost a lack of proper control, a lack of productivity or a passiveness that verged on helplessness. Having said that, I've no doubt that senior officers were trying whilst at the same time struggling with a very difficult situation. There's no one individual in particular that I can name.

172. I note the email dated 16 January 2013 (**CEC01930306**) where Mark Turley raised a query in relation to recharging of costs for officers working on the tram project. Broadly, within CEC directors were given a fixed budget to spend in

order to provide the services that they had to provide. Occasionally, certain projects or certain departments incurred a cost, usually staffing, that they charged back to the internal client department. So it was an internal charging system. That's why it was nicknamed recharging. By and large the costs of the CEC officers working on the tram project weren't included in the total cost of the tram project reported to members. With the exception of internal legal costs and maybe a few other minimal exceptions, internal staff costs of the Council were not recharged or included in the overall costs. By way of explanation, the legal team didn't have its own budget. Their costs were charged to the various departments as and when they needed their services. About 60 per cent of the legal budget was given to it as a fixed budget. Most other service areas in the Council had 100 per cent. Internal legal had about 60 and it had to recharge or earn income from its services. Broadly we were the only department that was actually geared up to be able to do that effectively and efficiently. We were the only department who needed to do it. There might have been a couple of others, but broadly it was just legal. I don't think there was anything else aggregated for the purposes of the tram project. That's not how it calculated its cost.

173. On 4 September 2013, I produced a progress report on Governance of Major Projects (**CEC01944159**). My report refers to the Corporate Programme Office (CPO) which had been set up to supervise major projects. It was set up to do three things. Firstly, to provide internal assurance over major projects. These were defined as projects over £5 million. The CPO ensured that those projects were governed properly, they were on time, they were on budget and operating to purpose. The CPO didn't take over the running of these projects. It was there to provide an oversight or assurance role in relation to the projects at inception, at gateway milestones and on completion. It provided internal project reassurance. Secondly, it was set up to run the Council's Change Programme. That programme is now very extensive. At that time it was embryonic. It never quite occurred at the time due to internal corporate management team resistance and lack of sponsorship from the top. However, it was set up later. Thirdly, it was set up to provide internal consultancy, help and support to those who needed and wanted it. That was another area that required internal

recharging to happen. In summary, it did three things – it provided internal assurance, it tried to start off the Council's Change Programme and it offered internal consultancy.

174. The tram project was kept outside the CPO because that was in intensive care. It was looked after as a hermetically sealed project. It didn't get put into this new major projects team that was set up.

175. The Council had a number of projects that weren't going entirely according to plan and trams, obviously, was the most notable. The CPO was set up to deal with these type of issues. As constituted now and if CEC were running the project it would have noticed the poor project management/ governance issues that arose. It would have noticed the on-going financial and timing bases coming out of it. It would have escalated matters. It would have been listened to. It would have reported to CEC coherently. It could have brought, and probably would have brought, a degree of rigour to the relatively lax controls and processes that existed at the time. Having said that, before the establishment of the CPO, CEC was, in many ways only overseeing the project. "Only overseeing" sounds an odd thing to say but the project was primarily being run and project managed by TIE which had been set up for that purpose. There was an internal control matter within the Council but there was also an issue about CEC needing to take more control over its subsidiary, TIE.

COUNCIL MEMBERS

176. How elected members were updated on matters really was a matter for the person in charge of the project, the Chief Executive or the relevant Executive Director. In the tram project's case it was up to the Executive Directors of City Development (which included Transport) and Finance to keep elected members informed. I can't comment on how that was done before the Settlement Agreement. After the Settlement Agreement, there was a very, very clear means of reporting through certain channels. I would struggle to provide any more detail than that. I'm afraid.

177. I note that the Tram Sub-Committee met on a limited number of occasions, namely 12 May 2008, 16 June 2008 and 27 October 2008, 30 March 2009, 10 August 2009 and 19 August 2009, 22 March 2010 and 28 March 2011. I think that the Tram Sub-Committee was a sub-committee of the Transport Committee in the Council which looked at trams. I never attended it. As previously explained, I joined the Council in December 2009 and became involved in the tram project from August 2010. I think probably the best person to give comment on the role and remit of the Tram Sub-Committee would be Dave Anderson or Marshall Poulton.

178. I would struggle to comment on what oversight and control, if any, did CEC's Audit Committee play in relation to the Tram Project and/or in relation to TIE and TEL. Alan Jackson was the Convener and Donald McGougan was the Executive Director for Finance responsible for audit. What went to the Audit Committee? I just don't know. Certainly after I became Director of Corporate Governance, about October 2011 time, I set up a very different committee i.e. the Governance Risk and Best Value Committee (often known as GRBV). That was a more involved, less reactive committee than the Audit Committee. The GRBV had very clear reporting, I think every two months, on progress, costs and timing. I can't say much more than that about the Audit Committee.

179. The Council had a number of internal control issues, which were all very well documented around that time, not just in relation to the tram project. One of the control issues came out of a relatively weak Audit Committee and arrangements within the Council. They needed to be beefed up severely. They've actually been praised by Audit Scotland in their more recent reports. GRBV was set up to be a more powerful scrutiny committee than existed previously. As for its exact remit and responsibilities, I can't help you with that but it will be well documented in some Council paper somewhere. The GRBV had a lot more power and ability to scrutinise than the Audit Committee. It was given teeth to actually get into matters. It was created not because of trams. It was created because of a number of issues like trams and controls in the Council. It looked

to the tram project every two months for full detail as to costings on the project and an update on the general progress.

180. Council officers continued to report on the tram project to full meetings of the Council but not so frequently as before. Before the Settlement Agreement there were reports going up in an ad hoc fashion to full Council on a regular basis. They did not always add an awful lot more information. The idea was that there'd be a lot more scrutiny through going to the Executive Committees. So the reports went to the Finance and Resources Committee, the Policy and Strategy Committee and the GRBV. The scrutiny in the committees could be intense. They got full detail and full briefings beforehand. Occasionally, the GRBV referred matters on to either of the other Committees or to full Council.

TIE

181. I slightly struggle commenting on how CEC exercised control and oversight over TIE. I wasn't overly involved in the apparatus of exercising oversight and control over TIE as Head of Legal and Administrative Services. That role was carried out by those who were responsible for the project i.e. Tom Aitchison, Dave Anderson, Donald McGougan and Marshall Poulton. Those persons would all be better placed than me to comment on how CEC exercised control and oversight over TIE. I am aware that, before my time, certain individuals in the Council were deployed to sit within TIE. I think there was some scrutiny there. In relation to the Tram IPG, if it had a role to oversee TIE, its role was not clear and it wasn't effective.

182. I did have concerns about the performance of TIE as an organisation. I have already made my views very clear earlier on in my statement on how effective I thought they were.

183. I don't know the formal mechanics of how the Council's senior officers received information and updates from TIE. I can only say that when I, or my team, sought information from TIE there was a general resistance, more often than not,

to providing that information. I did have concerns about TIE's reporting and whether that was always fully and accurately reported. I have commented on that earlier on my statement.

184. I don't know to what extent, if at all, information and reports produced by TIE were checked or validated by the Council and/or by independent external advisors instructed by CEC. The authors of the reports will be able to tell you about that. It wouldn't be abnormal for the Council to ask TIE for information. CEC should have been able to rely on that information if TIE were doing their job.

185. I note the email dated 13 October 2010 (**CEC00012750**) where Dave Anderson noted a concern that: *"The knowledge base in TIE appears to be vested in a very narrow base of 4 or 5 key people."* I don't think I saw that email. Either way I don't have any views on that.

186. I note the email dated 19 November 2010 (**CEC00013392**) where Nick Smith sent me an email he had sent to Donald McGougan and Andrew Holmes on 10 December 2007, some three years earlier, attaching a commentary document (**CEC0001339**) he'd prepared in relation to a draft Operating Agreement (**CEC00013394**) being negotiated at that time between CEC and TIE. Nick refers to paragraph 14 of his Commentary Document and notes that *"If this had been left in then there may have been control"*. I'd expressed my views to Nick Smith about how weak the Operating Agreement appeared to be. By operating agreement, it really means shareholder agreement. Nick Smith wanted me to know that, at the time of his negotiating the agreement, many of the shareholder control provisions that he wanted and thought were important were watered down at TIE's insistence / on the instruction of senior executives in the Council. I didn't disagree with Nick's comments. I probably didn't have any great views on his comment that *"If this had been left in then there may have been control"*. I think he is specifically referring to bonuses there but the concern was much wider than bonuses namely how the Council exercised oversight on the project as a whole.

CEC0001339 should be CEC00013393

187. I note that in 2012, CEC published figures showing the Council's payments to former TIE employees in 2011/2012 (**TRS00013564**). The payments included bonus payments to certain employees in compensation for loss of office. Dave Anderson negotiated these with the employees of TIE. I don't know whether he got the consent of the Chief Executive or not. Certainly they were negotiated by Dave with TIE in place. I had no role in approving that. You have asked if I had a view on these figures. At the time I did have a strong personal view as to whether these payments were reasonable or appropriate given the problems with the tram project. I thought they were wholly inappropriate in the circumstances and effectively a reward for failure but they were a fait accompli – Dave Anderson had already done the deal with senior personnel at TIE.

TRAM PROJECT BOARD

188. I would struggle to describe the role, remit and responsibilities of the TPB. TIE, TEL and TPB were coming to an end following mediation and before the Settlement Agreement.

TRANSPORT SCOTLAND

189. I note the agreements dated 16 and 17 January 2012 between CEC and Transport Scotland put in place after the Settlement Agreement (**TRS00014693**). I negotiated that document with TS and it was drafted by TS and revised by CEC legal. I understand that TS were involved way back at the time of contract inception and then stepped back. I know that TS attended the mediation through Ainslie McLaughlin. TS attended some of the negotiations at McGrigors, again, through Ainslie McLaughlin. TS attended the Project Board sessions (the twice-weekly meetings). They came along as part of the new governance arrangements set up when the Council took over from TIE. I would say they were primarily observing.

TRS00014693 should be TSI00000001

190. I genuinely think there was no discernible difference following TS's increased involvement. This is contrary to possibly what the Scottish Government was saying or what the press were saying. Notwithstanding the terms of the Agreement (where TS actually had powers to step in) on a day-to-day perspective TS attended more in an observer capacity.

191. I think it wouldn't have hurt if TS had maintained or taken a more direct role in the tram project earlier. However, I personally didn't see any real active intervention on TS's part post-mediation at all. The one exception where they were able to help was maybe when we needed to liaise with Government ministers. They could get us access more easily. Broadly, it was good to have them there. I think by then the project was on a substantially better footing. They didn't have to exercise the powers they had because by then we were on a substantially better footing.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 63 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature.

Date of signing....................................... 4 November 2016

ADDITIONAL QUESTIONS FOR ALASTAIR MACLEAN (2.3.18)

1. At the hearings (20 September 2017, transcript pages 48- 77 and 183-189), you were asked about the report to Council on 14 October 2010 by the Directors of Finance and City Development (CEC02083124) including, in particular, the sentence in the report that *"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"* (paragraph 2.50) (which sentence first appeared in the report to Council on 24 June 2010, CEC02083184, paragraph 3.12). We have since identified the following emails: (i) an email dated 6 October 2010 from Alan Coyle to Dave Anderson and others (CEC00013930) which attached a draft (v1.5) of the report to Council on 14 October 2010 (CEC00013931, password "14.5") which contains a discussion of the outcome of the DRPs but does not contain that sentence, (ii) an email dated 7 October 2010 from you to Nick Smith in which you stated, "Can't open as I don't know the password but suffice to say I don't like the idea of going into the detail of DRPs for reasons I have already made clear at the meeting earlier today. The agreed position was that we would not extend the risk beyond that taken inadvertently in June so I am surprised if Richard wants to do the exact opposite of that now. Please remove any wording that goes beyond June" (CEC00012663), (iii) an email dated 8 October 2010 from Nick Smith to Alan Coyle in which Mr Smith (CEC00036170) suggested a new paragraph in relation to the DRPs, which included the sentence, *"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"* and (iv) an email dated 8 October 2010 from Nick Smith to you (and Carol Campbell), forwarding Mr Smith's said email to Mr Coyle, including his proposed paragraph in the report in relation to the DRPs (CEC00036173).
   (a) In your email of 7 October 2010 you referred to not extending the risk "beyond that taken inadvertently in June". What was that a reference to?
   (b) What did you mean in your email of 7 October 2010 by your request to "Please remove any wording that goes beyond June"?
   (c) Did you have any concerns that if the wording in the report to Council on 14 October 2010 was not to go beyond that in the report to Council on 24 June 2010, the report to Council in October 2010 would not fully take into account the further adjudication decisions between June and October 2010 and may, therefore, be misleading or potentially misleading?
   (d) It appears that by email dated 8 October 2010 (CEC00036173) Mr Smith sent you his proposed paragraph 2.49 (which became paragraph 2.50) of the report to Council on 14 October 2010. It appears, therefore, that you were aware of the

wording in that paragraph, including the sentence, *"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"*, before the meeting of Council on 14 October 2010. Do you agree? If so, that seems inconsistent with your evidence that you were first aware of the wording at the meeting of Council on 14 October 2010. Do you have any explanation for that apparent discrepancy? Are you able to explain why you did not take issue with what was said in the report in relation to the outcome of the DRPs either before, or at, the meeting of Council on 14 October 2010?

Answers supplied by Alastair Maclean via email on 19 March 2018

Alastair Maclean

Response to request for further information

Edinburgh Tram Inquiry ("ETI")

March 2018

1. Background

I have provided written evidence to the ETI on 4 November 2016 and oral evidence on 20 September 2017.

On 15 March 2018, the ETI raised some additional questions and provided me with relevant copy emails. These relate to what was reported to the City of Edinburgh Council (the "Council") in October 2010 in connection with the outcome of the adjudications.

I have reviewed the emails and also found in my own files a copy of:

(1) handwritten comments I marked on a draft of the October 2010 report (which appears to be Alan Coyle's ("AC") draft, numbered v 1.5); and

(2) a different version (numbered v1.6) of the draft report with covering email to AC from Nick Smith ("NS") dated 6 October 2010 at 1443.

The different drafts are confusing and it looks as though there may have been a problem with version control.

A pdf copy of both items is attached.

2. 14 October 2010 Council report

The October 2010 Council report came at a time when I had become sceptical about tie's strategy and prospects of success in the contractual dispute with the Infraco.

I believe I have given evidence to the ETI about the steps I was taking to ingather the appropriate information and to obtain independent advice for the Council, often in the face of fairly stiff resistance.

The Council was at that stage not yet in a position to challenge the advice from tie in any meaningful way and my strategy was to get the "legal ducks in a row" over the following weeks, so that a more informed and reasoned approach could be taken by the Council.

It is difficult to remember the chronology of events after all this time but to the best of my recollection, assisted by the papers I have available to me, the events surrounding the preparation of this report and my involvement in it are as follows:

2.1 AC and NS had been drafting the Council report on behalf of Dave Anderson ("DA"), the Director of City Development and SRO of the project with input from tie;

2.2 I (along with others at the Council and tie) was sent AC's draft report v1.5 by his email of 6 October 2010 1233;

2.3 Shortly after that, at 1443 the same day, NS sent an email to AC that had a different version of the draft attached;

I see that NS refers to my concern that the draft should not breach the confidentiality provisions in the Infraco contract which could have resulted in a technical breach by tie.

2.4 On 7 October 2010 at 2102 I replied to an email received from NS at 2038. In that email NS had forwarded on an updated draft which I was unable to open as it was password protected but I could see from the email chain that Richard Jeffrey of tie had added into the Council report some "numbers".

In that email I say:

"*...The agreed position was that we would not extend the risk beyond that taken inadvertently in June so I am surprised if Richard wants to do the exact opposite of that now.*

Please remove any wording that goes beyond June."

I was simply restating to NS my earlier comments that I did not want to run the risk of breaching the confidentiality provisions in the Infraco contract thereby resulting in tie being in technical breach.

I was also aware that the previous reporting on these matters to the elected members of the Council had taken place in June. There was a concern at that time that the Council/tie had inadvertently breached confidentiality by the wording in that June report and I asked that this report did not give any further detail so as not to exacerbate that concern any further.

At this stage, the concern was primarily about tie being in breach of the confidentiality provisions in the Infraco contract.

2.5 When I read AC's draft v 1.5 mentioned above, I provided a handwritten mark up to NS. I cannot be certain exactly when that was but I believe that it would have been around 6/7 October 2010.

In that mark up, I made various amendments but the main ones of relevance are that I:

(a) deleted the wording in paragraphs 3.49 to 3.53; and

(b) instead substituted one simple paragraph 3.49 as follows:

"To date tie has been exercising its various rights and remedies under the Infraco contract but the detail of that needs to remain confidential at this stage. However, the Council should be aware that all options are being considered."

This version of the draft report was concerning because in addition to the confidentiality concern already mentioned, the language at paragraphs 3.49 to 3.53 went into detail about the adjudications, sought to justify tie's approach and present them in a favourable light and also gave detail in relation to the RTNs.

As I think I have explained to the ETI, I was hearing different views on the adjudication results (some of which were simply not credible) and I wanted the Council to get a proper independent analysis as to where we were and why in relation to the overall contractual position, rather than for tie's version of events simply to be put forward unchallenged. That analysis would include advice on the prospects of success in relation to termination of the Infraco contract by tie.

The essence of my revisals was to put a neutral holding position into the report to 'buy time' to enable a proper legal analysis by the Council (not tie) to be carried out, for me to understand that and then hopefully in turn for a more accurate and reasoned position to be reported to the elected members that the Council could properly stand behind.

I can see from the final published version of the report that some of my revisals relating to other paragraphs in the report have been taken into account but my substitute paragraph has not.

2.6 The ETI has now provided me with a copy of an email from NS to AC on 8 October 2010 at 0930 and an email with no covering message forwarding that on to me from NS on 8 October 2010 at 0931.

In that email NS proposes to AC that different wording is inserted into the 14 October 2010 Council report.

I do not recollect having seen that email although I can see that it was forwarded on to me.

My only comments on that are that I can only assume:

(a) those preparing the Council report had received further input from tie or others; and

(b) given that the Council paper would have been due to have been submitted on 7 October (ie one week before 14 October 2010), those preparing the report may have been under pressure to make last minute changes and submit the report.

2.7 Notwithstanding that email, the first time that I remember seeing the erroneous wording was in the 14 October Council meeting when the item was being considered by the elected members. I do recollect being exasperated and annoyed that there had been a continuation and repetition of the earlier overly optimistic version of events. However, I took the view that for the first time a proper reasoned analysis of Council's

legal position was being carried out and the position could be rectified in the following weeks/months when we were in a better informed position to do so. At that time reporting on the project was fairly regular.

3. Questions posed by ETI

I now turn to the particular questions (in bold) posed by the ETI:

(a) In your email of 7 October you referred to not extending the risk "beyond that taken inadvertently in June". What was that a reference to?

As indicated at para 2.4 above, I was aware that previous reporting on these matters to the elected members of the Council had taken place in June. There was a concern that the confidentiality provisions of the Infraco contract had been inadvertently breached by Council/tie as a result of the wording in the June report.

(b) What did you mean in your email of 7 October 2010 by your request to "please remove any wording that goes beyond June"

As indicated at para 2.4 above, I asked that October report did not go into any further detail at that stage in a way that would exacerbate the above concern any further.

(c) Did you have any concern that if the wording in the report to Council on 14 October 2010 was not to go beyond that in the report on 24 June 2010 the October report would not fully take into account the further adjudication decision between June and October and may therefore be misleading or potentially misleading.

Based on my/the Council's incomplete knowledge at that time, we were not in a position to inform the elected members about the full import of the adjudication decisions unless we simply put forward tie's version of events as had happened previously. To avoid doing so, the revised wording which I had sought (which ultimately did not end up in the final version to the elected members) was to delete all information about the adjudications and to insert wording which was more of a neutral holding position until a better informed position could be taken to the elected members.

(d) It appears that by email 8 October Nick Smith sent you his proposed paragraph 2.49 (which became para 2.50) of the report to Council on 14 October 2010. It appears therefore that you were aware of the wording in that paragraph including the sentence "the outcome of the DRPs in terms of legal principles, remains finely balanced and subject to debate between the parties", before the meeting of Council on 14 October 2010. Do you agree?

No.

As indicated at paragraphs 2.6 and 2.7 above, I do not recollect having seen that email although, having been sent it by the ETI, I can see that it was forwarded to me.

Please see my comments above.

If so, that seems inconsistent with your evidence that you were first aware of the wording at the meeting of Council on 14 October 2010. Do you have any explanation for that apparent discrepancy?

See above

Are you able to explain why you did not take issue with what was said in the report in relation to the outcome of the DRPs either before or at the meeting of Council on 14 October 2010.

As indicated above at paragraph 2.7, notwithstanding the email which you have forwarded to me, the first time that I remember seeing the erroneous wording was in the 14 October Council meeting when the item was being considered by the elected members. That is why I did not take issue with it before the meeting. Looking back, I do wish that I had seen a final version of this report before it was submitted to check whether or not my comments had been appropriately reflected.

I did not take issue with it in the Council meeting. It would have been unheard of and a significant breach of protocol for a third tier officer (as I was at that stage) to correct a Director's report in public and in front of the elected members. It is also not widely understood that officers (even the Directors) do not speak to their reports at meetings of the full Council. At the time I believed that I had given my advice on this matter and if my superiors chose to override that that was their prerogative to do so. As I think I indicated to the ETI in my oral evidence, I took the view that rather than creating further confusion, a wiser course of action was to continue to pull together for the first time a proper reasoned analysis of Council's legal position and once that was done the matter could be rectified, if needs be, in the following weeks/months when we were in a better informed position to do so. As the ETI is aware, matters were subsequently overtaken by the political and commercial desire to move to a short form mediation process.

Alastair D Maclean

Edinburgh

19 March 2018